UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
PLAINTIFF-PETITIONER,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**MEMORANDUM IN OPPOSITION TO PETITION FOR 10(j) INJUNCTION** ***Hearing/Oral Argument Requested***
DEFENDANT-RESPONDENT.	)	

Defendant-Respondent Mike-Sell's Potato Chip Company ("Mike-sell's" or "Company") strongly opposes the Petition for 10(j) Injunction ("Petition") and Memorandum in Support filed by Plaintiff-Petitioner Garey E. Lindsay, Regional Director for Region 9 of the National Labor Relations Board ("Regional Director" or "Petitioner"), on behalf of the National Labor Relations Board ("Board"). The Petition seeks interim injunctive relief pending final resolution of a Complaint and Notice of Hearing ("Complaint") issued in Board Case No. 09-CA-184215 based on an Unfair Labor Practice Charge ("Charge") filed by the International Brotherhood of Teamsters, Local Union No. 957 ("Union"), alleging Mike-sell's violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act") by (1) not bargaining over its decision to sell sales territory to independent distributors, and (2) not providing information sought by the Union for such decisional bargaining. For the forthcoming reasons, Mike-sell's urges this Court to deny the Petition, as 10(j) relief is <u>not</u> just and proper.

Respectfully submitted,

<u>/s/ Jennifer R. Asbrock</u>
Jennifer R. Asbrock (Ohio #0078157)
jasbrock@fbtlaw.com
Catherine F. Burgett (Ohio # 0082700)
cburgett@fbtlaw.com
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 779-8630
Facsimile: (502) 581-1087
Counsel for Mike-sell's Potato Chip Co.

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SUMMARY OF ARGUMENT

Section I of Mike-sell's Argument explains that Petitioner must satisfy two burdens in order to support the request for 10(j) injunction relief. To grant the petition, this Court must find that (1) "reasonable cause" exists to believe unfair labor practices occurred; and (2) an interim injunction is "just and proper." The "just and proper" inquiry focuses on whether injunctive relief is necessary to return the parties to the *status quo* pending the Board's proceedings in order to protect the Board's remedial powers and whether achieving the *status quo* is possible. *See NLRB v. Voith Indus. Servs., Inc.*, 551 F. App'x 825, 827 (6th Cir. 2014); *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 212 (6th Cir. 1995); *Glasser v. ADT Sec. Servs., Inc.*, 379 F. App'x 483, 486 (6th Cir. 2010).

Section II of the Argument shows Petitioner cannot establish that "reasonable cause" exists to believe Mike-sell's violated Sections 8(a)(1) or 8 (a)(5) of the National Labor Relations Act. First, the elimination of individual routes—like the closure of discrete business units—is not a mandatory subject of bargaining, so Mike-sell's was not legally required to bargain with the Union over its decision to sell the four routes at issue. Despite any collective bargaining relationship, and regardless of the presence or absence of any labor contract, employers generally retain certain inherent rights to manage their business, unless and until such rights are expressly bargained away. *First National Maintenance* and its progeny provide that an economically-motivated decision to shut down part of the business involves a change in the scope and direction of an enterprise and is not a mandatory bargaining subject. 452 U.S. 666, 674 (1981). Mike-sell's decision to sell four routes constituted a basic change in distribution operations for those discrete business units, which had historically been run by drivers. To require bargaining over the decision to close individual business units and redistribute assets and capital would significantly abridge the Company's freedom to manage its affairs. *See, e.g., NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 110 (8th Cir. 1963); *W. Virginia Baking Co.*, 299 NLRB 306 at 307-16, 325 (1990).

Second, assuming *arguendo* that the sale of routes is a mandatory bargaining subject, Mike-sell's made no material, substantial, and significant change to drivers' terms and conditions of employment by selling the four routes at issue. On more than a dozen occasions during the seven-year period preceding the sale of the four routes at issue, Mike-sell's sold to distributors routes historically serviced by drivers. Thus, the Union must have recognized the sale of more routes was possible, particularly given that the Expired Contract (and the Revised Final Offer) expressly permits (and does not in any way restrict) the elimination of routes. Because the sale of routes was made pursuant to a longstanding practice, it represents a continuation of the *status quo* and not a violation of the Act. *See The Bohemian Club & Unite Here! Local 2*, 351 NLRB 1065, 1066 (2007); *Int'l Bhd. of Teamsters, Local No. 507, Afl-Cio & George R. Klein News Co.*, 306 NLRB 118, 136 (1992); *Wp Co., LLC*, 358 NLRB 318, 323-24 (2012) (affirming ALJ Decision in *Wp Co., LLC d/b/a the Washington Post & Washington Mailers Union No. 29 Printing, Publ'g, & Media Workers Sector of the Commc'n Workers of Am., Afl-Cio*, JD-70-11, 2011 WL 5562019 (Nov. 15, 2011)); *Walt Disney World Co. & United Food & Commercial Workers Union, Local 1625*, 359 NLRB 648, 652–53 (2013).

Third, even if Mike-sell's had materially changed the *status quo* by selling the four routes, the Union waived its right to bargain over those decisions. The Union's historical acquiescence to the sale of routes, and its historic failure to request bargaining, demonstrate a clear and unmistakable waiver of the Union's bargaining rights. *See Am. Diamond Tool, Inc. & United Steel Workers of Am., Afl-Cio-Clc*, 306 NLRB 570 (1992) (citing *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)); 306 NLRB 570, 570-71 (1992); *Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1084–85 (1993).

Fourth, because the decision to sell routes is not a mandatory bargaining subject (and/or because the Union waived its right to bargain), Mike-sell's need not produce information requested by the Union for the specific purpose of decisional bargaining. Employers are only required to produce such information as is needed by the Union to fulfill its statutory obligations. Unions cannot force employers to negotiate over non-mandatory subjects of bargaining, so they clearly have no statutory duty to bargain over such subjects, which in turn means they cannot justify information requests by asserting the information is needed for purposes of non-mandatory bargaining. Because the decision to sell individual routes to distributors reflects a fundamental change in the Company's distribution method for those particular sales territories—akin to closing discrete, stand-alone business units—which is not a mandatory subject of bargaining, Mike-sell's had the right to decline to respond to the Union's August 31st information request, which was made for the specific purpose of bargaining over the Company's change in distribution methods. *See Regal Cinemas, Inc. v. N.L.R.B.*, 317 F.3d 300, 309–10 (D.C. Cir. 2003); *First National Corp. v. NLRB*, 452 U.S. 666, 684 (1981); *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985); *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223, fn. 1 (1988); *In Re Pieper Elec., Inc.*, 339 NLRB 1232 (2003); *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831, 844 (4th Cir. 2000); *In Re California Pac. Med. Ctr. & Healthcare Workers Union Local 250*, 337 NLRB 910, 914 (2002).

Section III of Mike-sell's Argument shows that Petitioner cannot establish that interim injunctive relief would be "just and proper." First, the relief requested does not reflect the state of affairs existing prior to the sale of Routes 102, 104, 122, and 131. Instead, it seeks the very remedy Petitioner might hope to achieve from a ruling on the merits by the Board. As the parties are well aware, prior to the sale of Routes 102, 104, 122, and 131, the Company neither bargained with the union over its decision to sell delivery routes nor provided the union with information regarding the sale of routes. Furthermore, as Petitioner clearly recognizes, the sale of these four routes coincided with several employees' resignations or retirements, and no layoffs were necessary. Ultimately, any order requiring the Company to bargain over mandatory subjects or to provide information related to subjects of bargaining would simply duplicate the requirements already prescribed by the Act. As a result, the granting of the requested relief would not preserve the ultimate remedial power of the Board but would in effect be a substitute for the exercise of that power. *Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 280 (6th Cir. 1998); *Frye v. Pony Exp. Courier Corp.*, No. C2-94-363, 1994 WL 758335, at *4 (S.D. Ohio July 7, 1994); *Gunther v. San Diego & A. E. Ry. Co.*, 198 F. Supp. 402, 408 (S.D. Cal. 1961), *aff'd*, 336 F.2d 543 (9th Cir. 1964), *rev'd*, 382 U.S. 257, 86 S. Ct. 368, 15 L. Ed. 2d 308 (1965)

Second, the relief sought by the Petition would impose an undue hardship on Mike-sell's, its bargaining unit employees, and its distributors. Petitioner requests the Court issue an interim order requiring the Company rescind the sale of the delivery routes. Not only would such an order require the Company to interfere with (or commit breach of) its contractual relationships with distributors, it would require the reacquisition of all equipment necessary for servicing those routes, including delivery vans, hand-held scanners, and other expensive tools and equipment that have already been disposed. Moreover, requiring Mike-sell's to rescind its contracts with distributors would have negative effects on the efficiency and competitiveness of the Company. Because the requested remedy would cause irreparable harm to the Company, innocent third parties, and disserve the public interest as a whole, the petition for 10(j) injunction should be denied. *See Schaub v. Detroit Newspaper Agency*, 154 F.3d 276 (6th Cir. 1998); *Frye v. Kentucky May Coal Co. - River Div.*, No. CIV. A. 94-132, 1994 WL 739464, (E.D. Ky. Dec. 21, 1994); *Miller for & on Behalf of N.L.R.B. v. California Pac. Med. Ctr.*, 991 F.2d 536 (9th Cir. 1993).

Third, interim relief is not necessary to preserve the Board's remedial powers, and the mere suggestion that employees have become displeased with the Union is simply not enough to justify the extraordinary remedy of issuing a 10(j) injunction. While it is predictable that certain employees may "shun the union" now, as suggested by Petitioner, there is no evidence that these same employees would be unwilling or unlikely to support the Union if the Board eventually determines that the routes were illegally sold and that the contracts must be rescinded. Absent the provision of such evidence, no injunction is warranted under the standard set by the Sixth Circuit, and the Union's Petition for 10(j) injunction should be denied. *See Calatrello v. Am. Church, Inc.*, No. 1:05 CV 797, 2005 WL 1389042 (N.D. Ohio June 9, 2005).

STATEMENT OF FACTS

I. Historical Evolution of the Company's Business Model

Mike-sell's is a privately-held manufacturer of snack foods headquartered in Dayton, Ohio. (Ex. A – Kazer Aff., ¶ 3.) For over 100 years, Mike-sell's has manufactured and packaged snack products at its Dayton plant and then distributed them to retailers in Ohio, Indiana, Kentucky, Illinois, Michigan, and Pennsylvania through the help of route sales drivers ("drivers") and independent distributors ("distributors"). (Ex. A – Kazer Aff., ¶ 4.) Drivers are employed as part of the Company route sales division. (Ex. A – Kazer Aff., ¶ 5.) They are commissioned employees of Mike-sell's whose duties include loading trucks, traveling to customer locations, stocking shelves, taking retail inventories and replenishing product, performing point-of-sale marketing, and rotating and removing unsold or expired product. (Ex. A – Kazer Aff., ¶ 5.) In contrast, distributors are independently-owned businesses that take on the entire risk of loss by choosing the type and amount of product to market, buying that product outright from Mike-sell's, preparing merchandise displays, delivering, and re-selling the product to customers in order to recoup their own costs and (hopefully) make a profit. (Ex. A – Kazer Aff., ¶ 6.) For sales territories or "routes" serviced by distributors, the Company essentially sells the right to market its product within a specified geographic area,[1] and the distributors purchase Company product up-front and are thereafter the owners of that inventory and all the liability that comes with it. (Ex. A – Kazer Aff., ¶ 6.) On the whole, distributors have historically been responsible for servicing a far greater sales territory—and distributing far more Company product—than drivers. (Ex. A – Kazer Aff., ¶ 7.)

Company drivers are represented by the Union. (Petition - ECF 1, p. 4.) Their employment was formerly governed by a labor agreement effective November 17, 2008, to November 17, 2012 ("Expired Contract"). (Ex. A – Kazer Aff., ¶ 8.) From November 18, 2012, through June 12, 2013, drivers worked under the Company's unilaterally-implemented last, best, and final offer ("Final Offer").[2] (Ex. A – Kazer

[1] For the sake of brevity and to avoid confusion, Mike-sell's will hereinafter refer to its individual sales territories as "routes" throughout this proceeding. However, unlike Mike-sell's drivers, distributors are not actually required to follow any particular route or schedule, or to service any particular customer, within their individual sales territory. (Ex. A – Kazer Aff., ¶ 7.)

[2] The Company's Final Offer has no relevance to this dispute. The Board ultimately found the Company's unilateral implementation of its Final Offer to be unlawful. The Board's Order was later enforced by the U.S. Court of Appeals for the District of Columbia Circuit, although the Circuit Court recognized that the situation presented "a close case." *Mike-Sell's Potato Chip Co. v. NLRB*, 807 F.3d 318, 319 (D.C. Cir. 2015).

Aff., ¶ 9.) Since June 13, 2013, however, drivers have worked under the Company's revised last, best, and final offer ("Revised Final Offer"), which Mike-sell's contends was lawfully implemented after the parties reached a good faith impasse in June 2013.[3] (Ex. A – Kazer Aff., ¶ 10.)

Mike-sell's has been in business for over a century, but since about 2006, significant losses have forced the Company to rethink its business plan.[4] (Ex. A – Kazer Aff., ¶ 11.) One of the Company's key strategic objectives is to focus more on manufacturing and branding quality products, which is its biggest strength and most promising area for growth and profitability. (Ex. A – Kazer Aff., ¶ 12.) In contrast, Mike-sell's is not interested in growing its Company route sales division, which has lost money hand-over-fist for more than a decade.[5] (Ex. A – Kazer Aff., ¶ 13.) The Company has gradually reduced its Company route sales division by selling certain routes to distributors who purchase the product up-front, directly from Mike-sell's—thereby accepting the entire risk of loss—and have the exclusive right to re-sell those products as they see fit to retail and wholesale customers within their designated area.[6] (Ex. A – Kazer Aff., ¶ 14.) Some early examples of this business plan evolution—none of which the Union challenged—are as follows:

- In early 2009, one route was sold to Snyder's of Berlin. The displaced driver had the chance to bump into another route, but she chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (Ex. B – Plummer Aff., ¶ 4.)

[3] Petitioner repeatedly suggests that the Revised Final Offer "was found to be unlawfully implemented" and that Mike-sell's "has failed to rescind [these] unlawful, unilateral changes." (Memorandum - ECF 1-1, pp. 3, 10, 14.) These assertions ignore the distinction between the Company's Final Offer (implemented in November 2012) and the Company's Revised Final Offer (implemented in June 2013), attempting to portray the lawfulness of the Revised Final Offer as a foregone conclusion. However, consistent with Sections 10616 and 10646.1 of the Board's Casehandling Manual for Compliance Proceedings ("Manual"), the Regional Director has already recognized a "legitimate dispute" over the validity of the Revised Final Offer through the issuance of a Compliance Specification in Board Case No. 09-CA-094143, which expressly admits that "a controversy presently exists over whether the parties reached a good faith impasse about June 13, 2013." If the Company's reliance on the parties' June 2013 impasse was merely a "frivolous defense" to compliance with an enforced Board Order, then the Regional Director presumably would have initiated contempt proceedings instead of compliance proceedings, as directed by Section 10616 of the Manual. It is therefore clear that the lawfulness of the unilaterally-implemented Revised Final Offer has yet to be determined, so any suggestions to the contrary are misleading and disingenuous, at best.

[4] The main reason for these losses is the competitive imbalance between Mike-sell's and its primary competitors, Frito-Lay and retailer private-label products. (Ex. A – Kazer Aff., ¶ 11.) Unlike Frito-Lay and private-label brands, Mike-sell's cannot afford to intentionally discount its product so deeply as to take a temporary loss in order to steal away coveted shelf space and sales volume from smaller companies. (Ex. A – Kazer Aff., ¶ 11.) The Company's financial condition and competitive struggle are not unique in its industry. (Ex. A – Kazer Aff., ¶ 11) Across the country, local snack manufacturers consider Frito-Lay and private-label brands to be very large, fierce competitors with the ability to price local concerns out of business. (Ex. A – Kazer Aff., ¶ 11)

[5] For the 11-year period spanning from 2006 through 2016, the Company route sales division suffered a loss every year except 2009. (Ex. A – Kazer Aff., ¶ 13.) The total division losses during that 11-year period exceeded $9.4 million, whereas the meager division profits in 2009 barely surpassed $213,000. (Ex. A – Kazer Aff., ¶ 13.) Mike-sell's also suffered an overall operating loss in all but three of these 11 years, although overall losses for the entire 11-year period were less than $5 million. (Ex. A – Kazer Aff., ¶ 13.)

[6] In 2011, Mike-sell's employed about 80 drivers. (Ex. B – Plummer Aff., ¶ 3.) In 2012, the Company was forced to close three distribution centers and sell dozens of routes to distributors, reducing its workforce to around 35 drivers. (Ex. B – Plummer Aff., ¶ 3.) The number of drivers has further declined over the past five years, partially due to the sale of routes and partially due to route consolidations/mergers. (Ex. A – Kazer Aff., ¶ 15.) Mike-sell's currently employs 14 drivers who collectively serve 12 routes. (Ex. A – Kazer Aff., ¶ 15.) The rest of the Company's approximately 174 routes are serviced by 34 distributors. (Ex. A – Kazer Aff., ¶ 15.)

- In late 2009, Mike-sell's sold two routes to Ohio Citrus. Both displaced drivers could bump into other routes, but one chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (Ex. B – Plummer Aff., ¶ 5.)

- In late 2010, Ohio Citrus returned the two routes it purchased in 2009. Mike-sell's brought one route back in-house and reassigned it to a driver, but the other route was re-sold to Snyder's of Berlin. The Union was notified of these decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (Ex. B – Plummer Aff., ¶ 6.)

- In mid-2011, Snyder's of Berlin returned the route it purchased in 2010. Mike-sell's no longer wanted to service it, so it was mainly abandoned, except for a small part that was merged into an existing route. The Union was notified of this decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (Ex. B – Plummer Aff., ¶ 7.)

- In August 2011, Mike-sell's sold the newly-merged route, as well as one other route, to Buckeye Distributing. Each displaced driver bumped into another route. The Union was notified of these decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge. (Ex. B – Plummer Aff., ¶ 8.)

The Company's right to change distribution methods by selling routes to distributors was confirmed in 2012, through an arbitration award issued by Arbitrator Michael Paolucci ("Paolucci Award").[7] (Ex. B – Plummer Aff., ¶ 9 and Att. 1.) This was the first time the Company's decision to sell routes had been challenged, and the Union cited Article I (Recognition), Article II (Union Security), and Article VIII (Seniority) of the Expired Contract to support its grievance.[8] (Ex. B – Plummer Aff., ¶ 10.) The Union demanded, as a remedy, that Mike-sell's bargain over the decision and its effects. (Ex. B – Plummer Aff., ¶ 10.) After a full evidentiary hearing, Arbitrator Paolucci denied the grievance based on Section 5 of Article VIII-B (Route Bidding) of the Expired Contract,[9] as well as the Company's inherent entrepreneurial right to determine the nature, scope, and direction of its enterprise, and the manner in which it conducts business. (Ex. B – Plummer Aff., ¶ 10 and Att. 1, p.10.)

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[7] The Paolucci Award was issued during the term of the Expired Contract, which is the document the Union and the Regional Director believe should still govern drivers' employment today. (Ex. B – Plummer Aff., ¶ 9.) However, the route elimination provisions in Article VIII-B of the Expired Contract are substantively indistinct from those in Article 11 of the Revised Final Offer. (Ex. A – Kazer Aff., ¶ 35.)

[8] While its first grievance was pending, the Union filed an identical grievance to challenge a Greenville route sold in May 2012. (Ex. B – Plummer Aff., ¶ 10) After the Paolucci Award was issued, the Union withdrew its grievance challenging the elimination of the Greenville route. (Ex. B – Plummer Aff., ¶ 10.)

[9] Article VIII-B - Section 5 of the Expired Contract provides (in part): "In the event that it becomes necessary to <u>eliminate a route</u> or combine one route with another, employees affected shall have the right to displace a less senior employee." (Ex. B – Plummer Aff., ¶ 10.)

The Paolucci Award emphasized that Mike-sell's transfers both the risk and potential reward by selling routes to distributors, which distinguishes the situation from typical subcontracting.[10] (Ex. B – Plummer Aff., ¶ 12 and Att. 1, p. 17.) Because an entire sales territory—or business unit—is sold to a third party, Mike-sell's "reduce[s] its involvement to that of a supplier." (Ex. B – Plummer Aff., ¶ 12 and Att. 1, p. 17.) Unlike a subcontracting arrangement, the decision to sell routes necessarily involves a calculation of multiple factors beyond mere cost savings, such as return on investment and net impact on profitability of the whole enterprise. (Ex. B – Plummer Aff., ¶ 12 and Att. 1, pp. 17-18.) It essentially involves "a whole new method of doing business," whereby Mike-sell's "loses all control" of the distribution. (Ex. B – Plummer Aff., ¶ 12 and Att. 1, pp. 18-19.)

The Paolucci Award further confirmed that Article VIII-B of the Expired Contract—which permits Mike-sell's to "eliminate a route"—applies equally where routes are entirely abandoned and where routes are sold to distributors. (Ex. B – Plummer Aff., ¶ 13 and Att. 1, p. 20.) And while not requiring route eliminations to be financially justified, the Paolucci Award nevertheless recognized the untenable situation that could result if the grievance were sustained: Mike-sell's could be "forced to keep non-performing assets (in the form of a route)" and "forced to continue a business activity that loses money every day." (Ex. B – Plummer Aff., ¶ 13 and Att. 1, p. 18.)

After the Paolucci Award issued, the Company route sales division continued to flounder.[11] (Ex. A – Kazer Aff., ¶ 16.) Mike-sell's thus relied on the Paolucci Award (as well as controlling law) to eliminate over three dozen more routes after the term of the Expired Contract ended.[12] (Ex. A – Kazer Aff., ¶ 17.)

[10] Arbitrator Paolucci's Award seems to inadvertently confuse the number of routes owned/serviced by distributors with the number of distributors who own/service the routes. (Ex. B – Plummer Aff., ¶ 11 and Att. 1, p. 5.) It is common for several routes to be owned/serviced by one distributor. (Ex. B – Plummer Aff., ¶ 11.) Thus, as of June 27, 2012 (i.e., the date of the arbitration), Mike-sell's had 45 distributors that collectively owned/serviced 130 routes. (Ex. B – Plummer Aff., ¶ 11.)

[11] It is undisputed that Mike-sell's provided the Union with copies of requested Profit-and-Loss Statements for the Company's entire route sales division for recent years, all of which reflect large-scale losses. (Ex. A – Kazer Aff., ¶ 16.)

[12] On November 18, 2012, Mike-sell's sold 16 Cincinnati routes, 10 Columbus routes, and 3 Sabina routes to Buckeye Distributing. (Ex. A – Kazer Aff., ¶ 17.) About six months later, Mike-sell's sold 5 Greenville routes to Gaudio Distributing effective June 1, 2013. (Ex. A – Kazer Aff., ¶ 17.) The Company then sold 4 Springfield routes to Helm Distributing on August 18, 2013. (Ex. A – Kazer Aff., ¶ 17.) These route eliminations collectively reduced Company route sales division losses by more than 70%, improving from a loss of almost \$1.8 million in 2012 to a loss of about \$533,000 in 2013. (Ex. A – Kazer Aff., ¶ 18.) This, in turn, drastically reduced the Company's overall operating loss by more than 90%, going from a loss of over \$1.8 million in 2012 to a loss of about \$112,000 in 2013. (Ex. A – Kazer Aff., ¶ 18.)

Several of these routes were later returned to Mike-sell's and thereafter re-sold to new distributors.[13] (Ex. A – Kazer Aff., ¶ 19.) Mike-sell's notified the Union of each elimination decision and its effective date, and the Company further offered to bargain over any effects. (Ex. A – Kazer Aff., ¶ 17.) The Union neither requested to bargain nor filed a grievance or unfair labor practice charge to challenge the route eliminations. (Ex. A – Kazer Aff., ¶ 17.)

II. Events Precipitating the Instant Petition

In April 2016, Mike-sell's announced it would explore the possibility of selling more routes to distributors. (Ex. A – Kazer Aff., ¶ 20.) Mike-sell's wanted to explore opportunities for "operational and strategic business changes" that may allow the Company "to further enhance its focus on manufacturing and branding." (Ex. A – Kazer Aff., ¶ 20.) By letter to the Union dated April 27, 2016, Mike-sell's promised to "provide . . . timely notice of its decision" and "honor its obligation to bargain over the effects of the route elimination(s)." (Ex. A – Kazer Aff., ¶ 20.) The Union filed a grievance to challenge the Company's intent to sell additional routes, citing several provisions of the Expired Contract that would allegedly be violated if any route sales came to fruition. (Ex. A – Kazer Aff., ¶ 20.) However, the Union made no demand to bargain over the issue. (Ex. A – Kazer Aff., ¶ 20.) Mike-sell's processed the Union's grievance, but there was no labor contract under which to arbitrate. (Ex. A – Kazer Aff., ¶ 20.)

On July 11, 2016, Mike-sell's told the Union in writing of its decision to sell Route 102, covering the area around greater Xenia, Ohio. (Ex. A – Kazer Aff., ¶ 21.) The Union raised no objection to this decision, nor did the Union demand to bargain or file a grievance to challenge it. (Ex. A – Kazer Aff., ¶ 21.)

On August 29, 2016, Mike-sell's notified the Union in writing of its decision to sell Routes 104 and 122, covering territory in Bellbrook and Beavercreek, Ohio. (Ex. A – Kazer Aff., ¶ 22.) The Union filed a grievance to challenge the sale of both routes.[14] (Ex. A – Kazer Aff., ¶ 22.) The Union also sent Mike-sell's

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[13] For example, Helm Distributing returned the 4 Springfield routes and Gaudio Distributing returned the 5 Greenville routes after servicing them for a couple years, and Mike-sell's thereafter re-sold all 9 Greenville/Springfield routes to The Big TMT Enterprize LLC in December 2015. (Ex. A – Kazer Aff., ¶ 19.)

[14] Once again, Mike-sell's accepted and processed the grievance, but there was no labor contract under which to arbitrate. (Ex. A – Kazer Aff., ¶ 22.)

a letter demanding to bargain over the decision to eliminate Routes 104 and 122, as well as seeking documents purportedly necessary for the requested decisional bargaining. (Ex. A – Kazer Aff., ¶ 22.)

On September 12, 2016, Mike-sell's replied to the Union's demand, declining to engage in decisional bargaining over elimination of the routes and further declining to produce information requested for the specific purpose of such decisional bargaining.[15] (Ex. A – Kazer Aff., ¶ 23.) The Company explained its position in detail, citing specific passages from the Paolucci Award. (Ex. A – Kazer Aff., ¶ 23.) However, Mike-sell's also reiterated its willingness to bargain over the effects of any route eliminations,[16] as well as its willingness to produce information relevant or necessary for the Union to perform its statutory duty to bargain over <u>mandatory</u> subjects. (Ex. A – Kazer Aff., ¶ 23.)

Also on September 12, 2016, Mike-sell's notified the Union in writing of its decision to sell Route 131, covering territory in Middletown and Springboro, Ohio. (Ex. A – Kazer Aff., ¶ 25.) The Union filed a grievance over the sale of Route 131,[17] as well as the pending Charge challenging the elimination of all four routes since July 2016.[18] (Ex. A – Kazer Aff., ¶ 25.)

The elimination of Routes 102, 104, 122, and 131 collectively resulted in the one-time liquidation of Company assets valued at $127,400, as well as annual savings of at least $73,240 for non-labor expenses.[19] (Ex. A – Kazer Aff., ¶ 26.) For a regional family business like Mike-sell's, with total net assets of only $5.8 million,[20] the one-time capital recoupment combined with the annual savings meant that over $200,000 would be returned to Company coffers within 12 months. (Ex. A – Kazer Aff., ¶ 27.) Projecting the 2016 route eliminations to increase the Company's net worth by almost 3.5% in the first year alone, Mike-sell's

[15] Just a few days earlier, Mike-sell's had already given the Union requested copies of Profit-and-Loss Statements for the Company's route sales division for multiple years. (Ex. A – Kazer Aff., ¶ 23.)

[16] The Union never requested to engage in effects bargaining. (Ex. A – Kazer Aff., ¶ 24.) In any event, the sales of the four routes coincided with drivers' resignations or retirements, so there were no layoffs—just a rebid of routes. (Ex. A – Kazer Aff., ¶ 24.)

[17] Once again, Mike-sell's accepted and agreed to process the grievance, but there was no labor contract under which to conduct an arbitration. (Ex. A – Kazer Aff., ¶ 25.)

[18] On December 9, 2016, the Union amended its unfair labor practice charge, limiting the 8(a)(5) allegation of failure to provide information to the Union's information requests related to decisional bargaining over the sale or routes rather than the Union's information requests related to "contract negotiations." (Petition - ECF 1, p. 2 and Ex. 2.)

[19] The route eliminations also resulted in about $65,000 in labor cost savings for pension contributions, healthcare, workers' compensation premiums, and paid time off benefits, but these savings were completely offset by the higher cost of distributor margins as compared to the lower cost of driver commissions and/or weekly minimums. (Ex. A – Kazer Aff., ¶ 26.)

[20] Net shareholder equity as of April 1, 2017, was $5,817,522. (Ex. A – Kazer Aff., ¶ 27.)

had newfound confidence to reallocate resources and make major improvements in its manufacturing plant.[21] The four route eliminations also reduced the time managers spend running routes to cover for unplanned driver absences, a distraction consuming about 55 workdays per year before the route sales but only about 14 workdays per year after the route sales.[22] (Ex. A – Kazer Aff., ¶ 29.) Since recapturing an estimated 41 management workdays—about two full work months—per year, Mike-sell's has been able to significantly increase the time dedicated to calling on high-volume clients, selling incremental displays, managing customer relations concerns, updating point-of-sale merchandising and resetting retailer shelves, promoting new products, and generating new accounts. (Ex. A – Kazer Aff., ¶ 29.)

Despite submission of well-reasoned position statements summarizing the Company's response to the Union's Charge, the Regional Director issued the Complaint on March 17, 2017, seeking (in part) "an order requiring, on request of the Union, Respondent rescind the sales of its Ohio Routes #102, #104, #122 and #131 and assign those routes to Unit employees," and setting a hearing date of May 31, 2017. (Petition - ECF 1, Ex. 3.) In the meantime, the Regional Director petitioned this Court for an interim preliminary injunction, ostensibly to preserve the Board's remedial powers. (Petition - ECF 1.)

ARGUMENT

Section 10(j) of the Act permits the Board, upon issuing an unfair labor practice complaint, to petition a district court for "such temporary relief or restraining order as it deems just and proper." *NLRB v. Voith Indus. Servs., Inc.*, 551 F. App'x 825, 827 (6th Cir. 2014). This case falls far short of warranting 10(j) relief. First, the Petition does not set forth "reasonable cause" to suspect a violation, as the decision to sell routes in order to effect a change in distribution methods is not a mandatory subject of bargaining. Rather, the Company's ongoing shift in the scope and direction of its enterprise is consistent with past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award, and controlling law. Petitioner presents no

[21] In February 2017, for example, Mike-sell's invested over $260,000 to build and install a new overhead conveyor system in its manufacturing plant. (Ex. A – Kazer Aff., ¶ 28.) The Company's old system was still functioning as designed, but as compared to modern technology, it operated very slowly, produced excess waste and noise pollution, and often required expensive maintenance and increasingly hard-to-find parts. (Ex. A – Kazer Aff., ¶ 28.) Since its installation in February 2017, the new overheard conveyor has increased overall efficiency and reduced down time, waste, and maintenance costs. (Ex. A – Kazer Aff., ¶ 28.)

[22] These before-and-after estimates are based on an average of full-year absenteeism statistics for 2014 and 2015 versus partial-year absenteeism statistics (annualized) for 2016 and 2017. (Ex. A – Kazer Aff., ¶ 29.)

evidence of improper motive to discredit the Company's judgment about which business model to follow, which business units to retain, or which business methods to employ.[23] And because the Union cannot force bargaining over non-mandatory subjects, Mike-sell's need not produce information requested for such decisional bargaining. Second, a 10(j) injunction would not be "just and proper" because the Petition is overbroad, does not seek return to the *status quo*, and imposes an undue hardship on Mike-sell's, its employees, and its distributors. There is simply no evidence that, absent an interim injunction, the Board could not award full and effective relief at the close of its proceedings. Thus, the Petition should be denied.

I. Petitioner Must Satisfy Two Separate Burdens Under the Applicable Legal Standard in Order to Support the Request for 10(j) Injunctive Relief.

To grant the Petition, this Court must find that (1) "reasonable cause" exists to believe unfair labor practices occurred; and (2) an interim injunction would be "just and proper." *Voith*, 551 F. App'x at 827; *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208, 212 (6th Cir. 1995). The "reasonable cause" prong requires Petitioner to establish a theory of liability that is "substantial and not frivolous" and to "present enough evidence in support of its coherent legal theory to permit a rational factfinder, considering the evidence in the light most favorable to [Petitioner], to rule in favor of the Board." *Automatic Sprinkler*, 55 F.3d at 212; *Glasser v. ADT Sec. Servs., Inc.*, 379 F. App'x 483, 486 (6th Cir. 2010). The "just and proper" inquiry focuses on "whether [injunctive] relief is necessary to return the parties to [the] *status quo* pending the Board's proceedings in order to protect the Board's remedial powers . . . and whether achieving [the] *status quo* is possible." *Automatic Sprinkler*, 55 F.3d at 214 (internal quotations and citations omitted). If the Court is unable to make one or both findings, the Petition must be denied. *Id.*

In *Automatic Sprinkler*, the Sixth Circuit upheld the denial of 10(j) relief, even though reasonable cause existed to believe unfair labor practices had occurred. *Id.* at 209, 215. The Board had shown reasonable cause by introducing the employer's internal subcontracting plan, which confirmed in writing its goals to "avoid being a signatory to any union contract," "eliminate labor negotiations," "eliminate costs

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[23] Contrary to Petitioner's disingenuous suggestion, Mike-sell's has never sold routes for the purpose of discriminating against the Union or eroding its support, as evidenced by the fact that the Union voluntarily withdrew its 8(a)(3) claim. In fact, Mike-sell's planned all route eliminations in 2016 to coincide with resignations or retirements, so this natural attrition avoided the need for layoffs. (Ex. A – Kazer Aff., ¶ 30.)

associated with union grievances," and "reduce administration costs associated with union labor."[24] *Id.* at 213. The subcontracting decision was a mandatory bargaining subject because the employer (1) replaced its employees with those of the contractor; (2) continued the same line of business in the same location; and (3) identified labor costs as the basis for subcontracting. *Id.* The employer also did not bargain in good faith because it failed to meet with half the affected union locals before subcontracting, thus presenting them with *a fait accompli*. *Id.*

Despite finding "reasonable cause," the Sixth Circuit nevertheless ruled that the interim relief requested in *Automatic Sprinkler* was "too broad, would result in undue financial hardship to the Company, and [wa]s not necessary to preserve the ultimate remedial authority of the Board." *Id.* at 214. The employer had suffered financial losses due to using union labor for sprinkler installations, so the company had already subcontracted that work and sold its tools, vehicles, equipment, and supplies. *Id.* at 215. Reinstating the *status quo* would force the employer to re-purchase or re-lease the items it sold, as well as re-hire clerical staff to coordinate installations. *Id.* The Sixth Circuit rejected the Board's argument that injunctive relief was "necessary to prevent employees from 'scattering to the four winds' immediately." *Id.* While the union might have been weakened by subcontracts for non-union labor, any harm was "too speculative to conclude that Board relief following unfair labor practice proceedings would be ineffective without injunctive relief." *Id.* Thus, the Sixth Circuit upheld denial of the petition because 10(j) relief was not "just and proper."

II. Petitioner Cannot Establish "Reasonable Cause" to Believe Mike-sell's Violated Section 8(a)(1) or 8(a)(5) of the Act.

This case stands in stark contrast to the egregious violations in *Automatic Sprinkler*, as the Regional Director neither advances a substantial legal theory nor presents evidence sufficient to permit a rational fact-finder to rule in the Board's favor. To establish an unlawful refusal to bargain under Section 8(a)(5), Petitioner must show that "there is an employment practice concerning a <u>mandatory</u> bargaining subject, and that the employer has made a significant change thereto without bargaining."[25] *Bath Iron Works Corp.,* 345

[24] Moreover, the employer's president and CEO repeatedly expressed a desire to convert the company into a non-union business. *Calatrello v. Automatic Sprinkler Corp.,* 55 F.3d 208, 213 (6th Cir. 1995).

[25] As explained later herein, if Petitioner satisfies this initial burden of proof, then Mike-sell's has the opportunity to defend its unilateral action by showing that the Union "clearly and unmistakably waived its right to bargain over the change." *Bath Iron Works Corp.,* 345 NLRB 499, 501 (2005).

NLRB 499, 501 (2005) (emphasis added). To establish an unlawful failure to provide information under Section 8(a)(5), Petitioner must show that Mike-sell's failed "to provide requested information that is potentially relevant and will be of use to a union in fulfilling its responsibilities as the employees' exclusive bargaining representative, including its grievance-processing duties."[26] *UPS, Inc.*, 362 NLRB No. 22 (Feb. 26, 2015). Petitioner makes neither showing, so no reasonable cause exists to suspect a violation of the Act.

A. The elimination of individual routes—like the closure of discrete business units—is <u>not</u> a mandatory subject of bargaining, so Mike-sell's was not required to bargain with the Union over its <u>decision</u> to sell the four routes at issue.

Despite any collective bargaining relationship, and regardless of the presence or absence of any labor contract, employers generally retain certain <u>inherent</u> rights to manage their business, unless and until such rights are expressly bargained away. For example, <u>absent evidence of anti-union animus</u>, an employer retains the <u>inherent</u> right to transfer and assign work;[27] maintain discipline;[28] promote efficiency;[29] control production;[30] change operational procedures;[31] invest or withdrawal capital;[32] and sell or merge business units.[33] Indeed, the U.S. Supreme Court has confirmed that decisions about what lines of business to pursue—and what methods to use in pursuing them—are likewise among the inherent rights of any

[26] The Petition also alleges a violation of Section 8(a)(1), which requires a showing that Mike-sell's engaged in conduct reasonably tending to "interfere with, restrain or coerce" employees in the free exercise of their Section 7 rights. *See Dover Energy, Inc.*, 361 NLRB No. 48 (2014), *enf. denied on other grounds in Dover Energy, Inc. v. NLRB*, 818 F.3d 725, 729-30 (D.C. Cir. 2016); *American Freightways Co., Inc.*, 124 NLRB 146 (1959). Mike-sell's assumes Petitioner's 8(a)(1) interference claim is derived from (and dependent upon) the 8(a)(5) claim because—apart from allegations about the sale of routes and the failure to provide information—the Petition provides no support for a separate 8(a)(1) claim. (Petition - ECF 1, pp. 1-3, 7.)

[27] *NLRB v. Acme Indus. Prod., Inc.*, 439 F.2d 40, 41-43 (6th Cir. 1971) (absent anti-union animus, employer not required to bargain over decision to move production unit to another plant); *Macy's Missouri-Kansas Div. v. NLRB*, 389 F.2d 835, 840-41 (8th Cir. 1968) (recognizing "historical rights of an employer to transfer employees as efficiency demands" and "the inherent right of an employer to assign work to his employees," particularly in absence of anti-union animus).

[28] *NLRB v. Louisiana Mfg. Co.*, 374 F.2d 696, 706 (8th Cir. 1967) (denying reinstatement to discharged employee because, despite anti-union animus, supervisor "had a right . . . to oversee the employees . . . keep them operating efficiently . . . and appl[y] discipline where . . . necessary").

[29] *Id.*

[30] *USW v. NLRB*, 243 F.2d 593, 596 (D.C. Cir. 1956), *rev'd in part on other grounds*, 357 U.S. 357 (1958) (finding that employer has "certain . . . inherent rights, such as the rights to production, to orderly conduct, and to cleanliness and order on his property").

[31] *NLRB v. Dixie Ohio Exp. Co.*, 409 F.2d 10, 10-11 (6th Cir. 1969) (absent anti-union animus, employer not required to bargain over decision to "streamline the procedure of loading and unloading merchandise," despite the fact that layoffs resulted); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 111, 113 (8th Cir. 1965) (absent anti-union animus, decision to distribute through independent operators instead of employee-salesmen was not mandatory bargaining subject because it involved "basic operational change" and "partial liquidation and a recoup of capital investment").

[32] *Adams Dairy, Inc.*, 350 F.2d at 111.

[33] *NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933, 938-39 (9th Cir. 1967) (finding that, absent anti-union animus, employer's termination of business and reinvestment of capital in different enterprise in another location is "[a] decision of such fundamental importance to the basic direction of the corporate enterprise" that it "is not included within the area of mandatory collective bargaining").

employer, and that such fundamental business decisions may be made without bargaining with the union. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

In *First National Maintenance*, the issue was whether "an economically-motivated decision to shut down part of the business" was a mandatory bargaining subject. *Id.* at 680. Two months after winning a certification election, the union gave notice of its desire to negotiate an initial contract. *Id.* at 669. The employer neither responded nor sought to consult with the union. *Id.* Then, two weeks later, the employer unilaterally cancelled a major services contract with a long-time customer, ignoring the union's demand to bargain over the issue. *Id.* The Supreme Court acknowledged that the decision to cancel the contract "had a direct impact" on the bargaining unit "since jobs were inexorably eliminated." *Id.* at 677. However, the decision "had as its focus only the economic profitability of the contract [with the customer], a concern . . . wholly apart from the employment relationship," so it "involve[ed] a change in the scope and direction of the enterprise . . . akin to the decision whether to be in business at all." *Id.* The High Court aptly explained:

> A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. . . . The union's practical purpose in participating, however, will be largely uniform: it will seek to delay or halt the closing. . . . It is unlikely . . . that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. . . .There is an important difference, also, between permitted bargaining and mandated bargaining. Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

Id. at 681, 683. Despite absence of a labor agreement or contractual management rights, the employer's decision to cancel the contract still was <u>not</u> a mandatory subject of bargaining. The Supreme Court balanced the parties' competing concerns and found that the employer's inherent managerial interest outweighed any potential impact on unit employees because "management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 674.

Here, as in *First National Maintenance*, the Company's sale of routes historically serviced by drivers represents a fundamental change in the scope and direction of its enterprise. (Ex. A – Kazer Aff., ¶ 31.) Because each individual route can be tracked separately for financial purposes, the sale of each route is analogous to the liquidation of a separate business unit, with the overall goal to increase profitability by freeing-up resources consumed by the Company route sales division and reallocating them to manufacturing and branding. (Ex. A – Kazer Aff., ¶ 31.) As the Paolucci Award recognized, when Mike-sell's sold its routes, the Company "transferr[ed] the expense <u>and</u> the potential revenue to a third party," thereby "removing the risk <u>and</u> reward from its purview." (Ex. B – Plummer Aff., ¶ 14 and Att. 1, p. 17 (emphasis in original).) Hence, "[i]n losing control of the business [unit], and the business decisions, the Company has reduced its involvement to that of a supplier." (Ex. B – Plummer Aff., ¶ 14 and Att. 1, p. 17.)

Both the Board (including Region 9) and the Circuit Courts have already held this precise decision—converting from drivers to distributors—to be a non-mandatory subject of bargaining. *See, e.g.*, *W. Virginia Baking Co.*, 299 NLRB 306 at 307-16, 325 (1990) (finding decision to convert from driver-salesmen to distributors was not mandatory subject and citing NLRB Region 9 Dismissal Letter in Case 09-CA-023141, stating "employer's decision to discontinue its own distribution system and rely on independent distributors involved a fundamental change in the nature and direction of the employer's operations"); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965) (same); *see also Agencia De Publicaciones De Puerto Rico, Inc.*, 353 NLRB No. 68 at fn.9 (Dec. 24, 2008) (in light of *First Nat'l Maint.*, complaint failed to state claim by alleging "decision to sell . . . distribution rights [wa]s a mandatory subject of bargaining"); *Johnson's Indus. Caterers, Inc.*, 197 NLRB 352, 355 (1972) (assuming without deciding that "an employer is not required to bargain about a decision to change from an employee distribution system to a system of distribution by independent contractors").

In the strikingly-similar case of *Adams Dairy*, for example, the Eighth Circuit confirmed that an employer's decision to liquidate part of its business is <u>not</u> a mandatory subject of bargaining. There, a dairy decided to change its direct sales distribution system by selling product directly to distributors, who in turn would re-sell it to retail and wholesale outlets. *Id.* at 111; *see also Adams Dairy Co.*, 137 NLRB 815, 819 (1962), *enforcement denied* (citing details of employer's business). The dairy's routes and trucks were sold to distributors as part of the conversion, and the only expectation was that distributors maintain sanitary facilities, high-quality product standards, and goodwill. *Id.* The sales territory purchased by distributors—though similar—did not mirror the routes formerly serviced by driver-salesmen. *Id.* In addition, the distributors took title to the product as soon as they received it, so the dairy had no legal concern for its product thereafter, as the distributors were responsible for re-selling it to recoup their investment. *Id.*

The Eighth Circuit contrasted the U.S. Supreme Court's opinion in *Fibreboard Paper*, where the decision to subcontract maintenance work "did not alter the [c]ompany's basic operation." 350 F.2d at 110 (citing 379 U.S. 203 (1964)). The Eighth Circuit agreed that, under *Fibreboard* circumstances,[34] "to require the employer to bargain . . . would not significantly abridge his freedom to manage the business." *Id.* at 111. But unlike the outsourcing in *Fibreboard*, the employer in *Adams Dairy* was not the primary beneficiary of the distribution work, as the dairy had no direct interest in whether distributors (as opposed to driver-salesmen) operated at a profit or loss. *Id.* Moreover, in *Adams Dairy*, the employer had already gradually sold ten routes, on a piecemeal basis, before its in-house distribution system was totally dismantled. *Id.* at 114. The Eighth Circuit thus found that the union "must have recognized" an entire system of distributors was possible—especially (but not exclusively) where the labor contract confirmed that "[n]othing . . . shall prevent Employer from enlarging, decreasing or altering the specified territory of any route nor . . . from putting on, splitting, rearranging, consolidating or eliminating any route . . . ." *Id.* at 114-15. The Eighth Circuit held that "the fact provision was made for the termination of a route should have, and probably did, put the union on notice" of the risk that all routes could be sold to distributors. *Id.* at 115.

Here, Mike-sell's made no discriminatory remarks or plans to oust the Union such as in *Automatic Sprinkler*, nor did the Company's actions equate to subcontracting such as in *Fibreboard*. (Ex. A – Kazer Aff., ¶ 32.) This case is far more analogous to *Adams Dairy*, as it extends beyond merely substituting "one set of employees for another." Mike-sell's changed its basic operations for four individual routes historically run by drivers, essentially selling the separate business units handling distribution for those areas. (Ex. A – Kazer Aff., ¶ 32.) This strategic change in the scope and direction of the Company's business resulted in a partial liquidation and recoupment of capital investment, as well as new revenue. (Ex. A – Kazer Aff., ¶ 33.) That is, Mike-sell's sold its delivery trucks and the sales territory they serviced, which did not perfectly match the former routes. (Ex. A – Kazer Aff., ¶ 33.) Mike-sell's also leased its handheld scanners to

[34] In *Fibreboard*, no capital investment was contemplated; the company merely replaced existing employees with independent contractors, who performed the very same work under similar conditions, but with no fringe benefits. *Fibreboard Paper*, 379 U.S. 203 (1964).

distributors, who began taking title to Company product upon receipt. (Ex. A – Kazer Aff., ¶ 33.) This arrangement essentially reversed the order in which Mike-sell's realizes revenue by selling product up-front and retaining no legal interest in it, thereby shifting the entire risk of loss to the distributor. (Ex. A – Kazer Aff., ¶ 33.) The Company's recouped capital and newfound revenue was, in turn, reinvested in core manufacturing and branding initiatives, two activities at the heart of the business. (Ex. A – Kazer Aff., ¶ 33.) To require bargaining over the decision to close individual business units and/or redistribute assets and capital would greatly abridge the Company's freedom to manage its enterprise. (Ex. A – Kazer Aff., ¶ 33.)

In short, the Complaint contains no allegation of anti-union animus, nor does any evidence suggest the Company's decision was motivated by anything other than its best business judgment. Under these facts, Petitioner cannot establish a violation of Section 8(a)(5) of the Act, so no reasonable cause exists to justify interim injunctive relief. *Bath Iron Works*, 345 NLRB at 502; *W. Virginia Baking Co.*, 299 NLRB at 318.

B. Assuming* arguendo *that the sale of routes is a mandatory bargaining subject, Mike-sell's made no "material, substantial, and significant change" to drivers' terms and conditions of employment by selling the four routes at issue.

To establish a failure to bargain under Section 8(a)(5) of the Act, the General Counsel must first prove that the employer unilaterally implemented "a material, substantial, and significant change" to the unit's terms and conditions of employment. *See, e.g., The Bohemian Club*, 351 NLRB 1065, 1066 (2007). Published and controlling Sixth Circuit precedent confirms that, "if an employer has frequently engaged in a pattern of unilateral change . . . during the term of the CBA, then such a pattern of unilateral change becomes a 'term and condition of employment,' and that a similar unilateral change after the termination of CBA is permissible to maintain the *status quo*." *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002). The Sixth Circuit thus emphasizes that "it is the actual past practice of unilateral activity . . . and not the existence of the management-rights clause . . . that allows the employer's past practice of unilateral change to survive the termination of the contract." *Id.*[35]

[35] Not surprisingly, Petitioner urges this Court to adopt a recent Board decision holding that "unilateral, post-expiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause." (Memorandum - ECF 1-1, p. 2 (citing *E.I. Du Pont De Nemours*, 364 NLRB No. 113, slip op. at 3-4 (Aug. 26, 2016).) This administrative parlance directly conflicts with the controlling Sixth Circuit authority established in *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002), as well as with prior Board decisions and other Circuit Court rulings. *See, e.g., Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319 (2006); *Courier-Journal I*, 342 NLRB 1093 (2004) and *Courier-Journal II*, 342 NLRB 1148 (2004); *Capitol Ford*, 343 NLRB 1058 (2004); *Westinghouse Elec. Corp.*, 150 NLRB 1574 (1965); *Shell Oil Co.*, 149 NLRB 283 (1964); *see also E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir.

Petitioner cannot demonstrate that Mike-sell's violated Section 8(a)(5) of the Act because the Company did not unilaterally change any of the drivers' working conditions. Mike-sell's sold and re-sold its driver-serviced sales territory to distributors on at least four dozen occasions during the seven-year period preceding the route eliminations at issue. (Ex. A – Kazer Aff., ¶ 34; Ex. B – Plummer Aff., ¶ 15.) More than three dozen of these route sales occurred after the end of the Expired Contract term, and while the Union received advanced notice of them, it neither demanded to bargain nor filed a grievance or unfair labor practice charge. (Ex. A – Kazer Aff., ¶ 15.)

Like the Eighth Circuit in *Adams Dairy*, the Paolucci Award points out that the Union "must have recognized" the sale of more routes was possible, particularly given that the Expired Contract (and the Revised Final Offer) expressly permits (and does not in any way restrict) route eliminations.[36] (Ex. B – Plummer Aff., ¶ 13 and Att. 1.) Thus, as in *Adams Dairy*, "the fact provision was made for the termination of a route should have, and probably did, put the union on notice" of the risk that Mike-sell's may choose to further reduce its Company route sales division by selling individual business units and reallocating its assets to manufacturing and branding. (Ex. B – Plummer Aff., ¶ 15 and Att. 1.)

In short, the Company's unilateral decision to sell the four routes at issue was consistent with the parties' past practice, the Expired Contract, the Revised Final Offer, the Paolucci Award (which the Union

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2012). It is well-settled that a published decision from a Sixth Circuit panel "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting *en banc* overrules the prior decision." *Sykes v. Anderson*, 625 F.3d 294, 319 (6th Cir. 2010). Hence, this Court is bound to recognize and apply the current controlling standard set by the Sixth Circuit, regardless of how the Board's own decisions fluctuate with the political tide. *See, e.g., Sterne v. Dean Witter Reynolds, Inc.*, No. C-1-85-124, 1986 WL 6185, at *3 (S.D. Ohio Jan. 16, 1986), *aff'd*, 808 F.2d 480 (6th Cir. 1987) ("we are compelled to follow present Sixth Circuit precedent"); *Beverly Enterprises v. N.L.R.B.*, 727 F.2d 591, 593 (6th Cir. 1984) ("The basic doctrine that, until reversed, the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction applies equally to the precedential rule of *stare decisis* and the policy rule respecting the law of the case."); *see also Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983) (recognizing that "the Board is not a court nor is it equal to this court in matters of statutory interpretation," and thus, "a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect"); *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980) (emphasizing that Circuit Court precedent is controlling as opposed to Board decisions, which commonly defy principles of *stare decisis* by ignoring controlling precedent).

[36] Notably, the Route Bidding Articles in the Expired Contract and Revised Final Offer are separate from, and unrelated to, the Management Rights Articles. (Ex. A – Kazer Aff., ¶ 35.) It would be inappropriate to treat these two distinct Articles in the same manner when they address different topics and are intended primarily for the benefit of opposite parties. (That is, the Route Bidding Article mainly benefits the Union, whereas the Management Rights Article mainly benefits the Company.) Even the Board suggests that discrete contract provisions containing context-dependent managerial rights must be analyzed separately from (and treated less critically than) broad management rights clauses that purport to "give the employer the world." *See, e.g., Walt Disney World Co.*, 359 NLRB 648, 652-53 (2013) (analyzing limited reservation of rights as to staffing for catering functions separately from broad management rights clause granting authority to select and direct number of employees assigned to particular job classification, and finding that neither provision permitted the elimination of unit job classifications); *Gratiot Cmty. Hosp.*, 312 NLRB 1075, 1084-85 (1993), *enf'd at Gratiot Cmty. Hosp. v. NLRB*, 51 F.3d 1255, 1260-61 (6th Cir. 1995) (finding that more limited reservation of rights provision—permitting employer to determine number of shifts—allowed employer to unilaterally eliminate special shift program altogether, despite finding that managements rights clause was too broad to confer such discretion).

never sought to vacate), and controlling law.[37] *Beverly Health & Rehab. Servs.*, 297 F.3d 468; *see also Wp Co., LLC*, 358 NLRB 318, 324 (2012) (employer did not violate Act where it had "longstanding practice" of unilateral changes such that further unilateral action of same ilk was "continuation of the *status quo*"). Thus, Mike-sell's implemented no "material, substantial, and significant change" to mandatory bargaining subjects.

C. Even if Mike-sell's had materially changed the **status quo** *by eliminating the four routes at issue, the Union waived its right to bargain over those decisions.*

A party may relinquish bargaining rights through a "clear and unmistakable" waiver. *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Waiver may be established "by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *Am. Diamond Tool, Inc.*, 306 NLRB 570, 570-71 (1992) (internal citations omitted.) For example, a union will waive its bargaining rights "if it receives advance notice of a proposed change and fails to request bargaining." *The Bohemian Club*, 351 NLRB at 1067. Waiver will likewise occur where no contract is in effect, the union has the chance to request bargaining over a mandatory subject but fails to do so, and the union further signals a willingness to permit the same kind of unilateral action in the future by proposing a management rights clause that would allow it. *Diamond Tool*, 306 NLRB at 570-71.

Assuming Mike-sell's materially changed drivers' employment terms by eliminating four routes in 2016, the Union nevertheless engaged in a course of conduct that clearly and unmistakably waived any right to bargain over those decisions. First, the Union knowingly acquiesced in the Company's unilateral sale of <u>over four dozen routes</u> between 2009 and 2016—with <u>more than three dozen</u> sales occurring <u>after</u> the

[37] The Regional Director has long insisted the Expired Contract should still be in effect today, as evidenced by its compliance position in Board Case No. 09-CA-094143. Mike-sell's disagrees with the Regional Director and believes the Expired Contract was only required to remain in effect through June 12, 2013, after which the Company was privileged to lawfully implement its Revised Final Offer (including the route elimination and management rights provisions) based on the parties' good faith bargaining impasse. *See, e.g., George R. Klein News Co.*, 306 NLRB 118, 136 (1992) ("an employer's obligation to comply and give effect to . . . a collective-bargaining agreement continues after the agreement expires, until the employer has fulfilled, or been relieved of its duty to bargain about changing the existing terms . . . as, e.g., where the parties have bargained to impasse, and the changes thereafter made are consistent with any bargaining proposal previously advanced by the employer . . . or, where . . . the union had effectively waived its right to bargain on the subject matter subsequently changed"); *Wp Co., LLC*, 358 NLRB 318, 323-24 (2012) (where good faith impasse existed, employer was privileged to continue past practice of unilaterally assigning non-unit employees to perform unit work without bargaining, where unilateral work assignments were consistent with terms of parties' tentative agreement). As a practical matter, regardless of whether the Expired Contract or the Revised Final Offer was in place when the four routes were sold, the Paolucci Award and Sixth Circuit law applies equally to both sets of terms because their Route Bidding Articles contain substantively indistinct route elimination provisions. (Ex. A – Kazer Aff., ¶ 35.) Nevertheless, it is absurd and hypocritical for the Regional Director to advocate for reimplementation of the Expired Contract as to Board Case No. 09-CA-094143, while completely ignoring the Route Bidding Article of that same Expired Contract for purposes of Board Case No. 09-CA-184215.

Expired Contract ended. (Ex. A – Kazer Aff., ¶ 34; Ex. B – Plummer Aff., ¶ 15.) Second, despite voicing displeasure with the Paolucci Award and dismay with distribution center closures during at least three bargaining sessions in October and November 2012, the Union nevertheless specifically proposed to keep the very same language in the Route Bidding Article that Arbitrator Paolucci had already interpreted to permit the Company's sale of routes. (Ex. A – Kazer Aff., ¶ 36.) Third, during at least four bargaining sessions after the Expired Contract ended and the Company's Final Offer was implemented,[38] the Union again proposed reinstating the Route Bidding Article that Arbitrator Paolucci found to allow unilateral route eliminations.[39] (Ex. A – Kazer Aff., ¶ 37.) Fourth, while the Union filed a grievance claiming various violations of the Expired Contract, it failed to actually demand bargaining after Mike-sell's announced the potential for more route eliminations in April 2016. (Ex. A – Kazer Aff., ¶ 38.) Fifth, despite receiving advance written notice of the sale of Route 102 in July 2016, the Union never demanded to bargain over that route elimination nor filed a grievance to challenge it. (Ex. A – Kazer Aff., ¶ 39.) These facts, as well as others to be presented at trial, conclusively prove the Union waived its right to bargain.

D. Because the decision to sell routes is not a mandatory bargaining subject (and/or because the Union waived its right to bargain), Mike-sell's need not produce information requested by the Union for the specific purpose of such decisional bargaining.

Employers are only required to produce such information as is needed by the Union to fulfill its statutory obligations. *See, e.g., Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985). Unions cannot force employers to negotiate over non-mandatory subjects of bargaining, so they clearly have no statutory duty to bargain over such subjects, which in turn means they cannot justify information requests by asserting the information is needed to fulfill statutory bargaining obligations. *See, e.g., Service Employees Local 535*, 287 NLRB 1223, fn. 1 (1988); *see also Pieper Elec., Inc.*, 339 NLRB 1232 (2003) (no duty to furnish information sought in connection with non-mandatory subject).

Mike-sell's had the right to decline to respond to the Union's August 31st information request, which was made for the specific purpose of bargaining over the Company's decision to eliminate routes in order to

[38] The proposed Route Bidding Articles in the Company's Final Offer versus Revised Final Offer are identical. (Ex. A – Kazer Aff., ¶ 35.)

[39] Notably, although the Paolucci Award did not rely on the Expired Contract's Management Rights Article, the Union also proposed to maintain the very same language in that provision as well. (Ex. A – Kazer Aff., ¶ 36.)

effect a change in distribution methods. (Ex. A – Kazer Aff., ¶ 40.) As discussed above, the decision to sell individual routes to distributors reflects a fundamental change in the scope and direction of the Company's enterprise—akin to closing discrete, stand-alone business units—which is not a mandatory subject of bargaining.[40] *See*, *e.g.*, *First Nat'l Maint.*, 452 U.S. at 684.

Petitioner urges this Court to adopt the burden-shifting test in *Dubuque Packing Co*., 303 NLRB 386 (1991), which was developed to analyze whether an employer's decision to "relocate bargaining unit work" required mandatory bargaining. (Memorandum – ECF 1-1, pp. 8-10.) Under the *Dubuque Packing* test, the Petitioner must first prove "that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation." *Dubuque Packing*, 303 N.L.R.B. at 391. If Petitioner successfully establishes a *prima facie* case, the burden shifts to the employer to demonstrate that (1) "the work performed at the new location varies significantly from the work performed at the former plant;" (2) "the work performed at the former plant is to be discontinued entirely and not moved to the new location;" or (3) "the employer's decision involves a change in the scope or direction of the enterprise." *Id.* Alternatively, the employer may show that either (1) "labor costs . . . were not a factor in the decision," or (2) even if they were a factor, "the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Id*.

Petitioner concedes that Mike-sell's eliminated routes by selling sales territory to distributors "for many years" because "it wanted to move away from the distribution portion of the business." (Memorandum – ECF 1-1, pp. 3-5.) The mere fact that labor costs constituted a minority share of the Company's operating expenses associated with the routes sold does not prove that Mike-sell's did not have larger, strategic reasons for deciding to sell routes. As the Fourth Circuit wisely explained in *Dorsey Trailers, Inc. v. NLRB*, "*Dubuque Packing* posits a false dichotomy between economic and labor costs." 233 F.3d 831, 844 (4th Cir. 2000). That is, economic reasons are not—and need not be—completely "distinct and apart from a desire to

[40] While Mike-sell's started out distributing its own products, the Company's core initiative has always been to manufacture and sell quality snack foods. Mike-sell's is not in the delivery business, and it makes no sense for the Company to continue funding a losing endeavor. It is common industry practice for snack food manufacturers to sell their routes to independent distributors. *See Mrs. Baird's Bakery*, 117 LA at 1054 (recognizing that "[u]sing Independent Distributors has been a growing trend"). In fact, there are national route brokers whose sole purpose is to assist businesses in buying and selling geographic sales territories from manufacturers who no longer want to service them directly. *See, e.g.,* http://www.mrrouteinc.com (visited 11/4/2016); http://www.routesforsale.net (visited 11/4/2016); http://www.routebrokers.com (visited 11/4/2016).

decrease labor costs." *Id.* (citing *Arrow Automotive Indus. v. NLRB*, 853 F.2d 223, 228 (4th Cir.1988)). Indeed, labor costs are "inescapably" a part of the economic calculus that any employer must consider in deciding whether to change its operation or business model. *Id.* I

The Company's decision to eliminate routes in order to reduce its Company route sales division necessarily involves a calculation of multiple factors beyond labor savings. Mike-sell's certainly considered how the sale of four routes would affect the Company's overall finances, such as the liquidation of assets, the reinvestment or withdrawal of capital, the savings on non-labor operational costs, and the savings on labor costs. Although Petitioner and the Union seem to suggest that Mike-sell's sold the four routes primarily to save on labor costs, the Company's labor savings were—by far—the smallest piece of the "financial pie," so much so that the $65,000 in fringe benefit savings was completely offset by the by the higher cost of distributor margins as compared to the lower cost of driver commissions and/or weekly minimums. Much more critical to the Company's decision was, for example, the ability to free-up supervisory manpower in order to invest more time managing the business rather than covering for drivers; shifting the risk of loss; obtaining a return on investment; and improving the net impact to the profitability of the entire company. As was true in *Adams Dairy*, the decision to sell routes represents "a whole new method of doing business" and to require the employer to bargain about the matter would significantly abridge his freedom to manage the business. Petitioner also takes issue with the fact that the Company "announced in April that it intended to sell the routes, but did not proceed with the sale for a 3 to 5 month period," and argues that the delay in sale "clearly demonstrates that there were not any speed or secrecy concerns necessitating a need for unencumbered decision-making." (Memo., p. 9.) But Petitioner misses the point entirely. Whether a decision is a mandatory subject of bargaining and thus subject to Section 8(a)(5) does not necessarily depend on the speed with which that decision must be made. Indeed, in *First National*, the Supreme Court expressly found that management's interest in whether it should discuss a decision of this kind is "complex and ***varies with the particular circumstances***." 452 U.S. at 682 (emphasis added). The Court explained that the decision to bargain can depend on a number of considerations:

> [M]anagement ***may*** have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It ***may*** face significant tax or securities consequences that

> hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining ***may*** injure the possibility of a successful transition or increase the economic damage to the business. The employer also ***may*** have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.

Id. at 682–83 (emphasis added). The need for speed and secrecy is just one of multiple potential reasons why changes in operational methodology are not mandatory subjects of bargaining. Other reasons might include the fact that a Company has no financial alternative but to make the operational change.

The fact that a route sale may have taken several months to negotiate does not indicate that speed was not desired. Any number of factors can influence the timeline of a route sale, and Petitioner is in no position to comment on, and has presented no evidence regarding, what is desired, expected, or reasonable with regard to the Company's business plan and sale of routes. Because the Union's August 31st information request was specifically seeking data for decisional bargaining about a non-mandatory subject—over which Mike-sell's did not agree to bargain—the Company's response to that information request did not violate Section 8(a)(5).[41]

III. Petitioner Cannot Establish That Interim Injunctive Relief Would be "Just and Proper."

Because labor disputes are reserved for the Board's exclusive purview, "courts must be mindful not to adjudicate the merits . . . in . . . ancillary 10(j) proceedings." *Voith*, 551 F. App'x at 827 (internal citations omitted). Section 10(j) is a rare exception to the Act's statutory scheme, and it was never intended to put federal courts "in the labor injunction business." *Jacksonville Bulk Terminals, Inc. v. International Longshoreman's Assoc.*, 457 U.S. 702, 712 (1982). The Board should thus seek 10(j) relief "only in cases of extraordinary circumstances, exercising its power, 'not as a broad sword, but as a scalpel, ever mindful of the dangers of conducting labor relations by way of injunction.'" *McLeod v. General Electric Co.*, 366 F.2d 847, 849-50 (2nd Cir. 1966). In turn, courts should only grant 10(j) relief if (and to the extent) reinstatement of the *status quo* is "reasonably necessary to preserve the ultimate remedial power of the Board," and if (and to the extent) it would not create an undue hardship for the employer, the employees, or innocent third parties.

[41] Once again, Mike-sell's had already produced copies of Profit-And-Loss Statements for the route sales division for multiple years, which consistently reflect the routes losing money.

Voith, 551 F. App'x at 833 (internal citations and quotations omitted); *Automatic Sprinkler*, 55 F.3d at 214; *Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 280 (6th Cir. 1998).

A. The relief requested in the Petition does not reflect the state of affairs existing prior to the sale of Routes 102, 104, 122, and 131.

The Sixth Circuit has described the *status quo* as being preserved by an injunction reinstating "that which existed before the alleged unfair labor practices took place." *Id.* at 834. Where the relief requested would not represent a return to the state of affairs that existed prior to the alleged unfair labor practices, or where the relief would create an undue hardship for the employer or innocent third parties, 10(j) relief is not appropriate. *Id.*; *Automatic Sprinkler*, 55 F.3d at 214; *Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 280 (6th Cir. 1998).

The relief requested by Petitioner does not represent a return to the *status quo* but instead seeks a very broad and overreaching remedy Petitioner hopes to eventually achieve from a ruling by the Board. Indeed, Petitioner requests an interim order requiring the Company "to rescind the sale of the delivery routes, meet and bargain with the union over its decision to sell those routes, and provide the union with information it requested regarding the sale of those routes[.]" (Memorandum – EFC 1-1, p. 12.) Assuming for the sake of argument that the sale of routes constitutes an unfair labor practice, the relief requested does not return the parties to the state of affairs that existed before the sale of routes. As the parties are well aware, prior to the sale of Routes 102, 104, 122, and 131, there were already going to be four driver vacancies due to natural attrition, and Mike-sell's would have had no legal obligation whatsoever to fill those vacancies. Nor did the Company bargain with the Union or produce information before the sale of routes. Thus, asking this Court to impose a "wish list" of terms that never existed to begin with can hardly represent a request for return to the *status quo*.

The same was true in *Frye v. Pony Exp. Courier Corp.*, No. C2-94-363, 1994 WL 758335, at *4 (S.D. Ohio July 7, 1994), where this Court declined to issue a 10(j) injunction. There, the petitioner argued that an injunction was necessary because the respondent's refusal to bargain with the union was causing the erosion of the union's membership. *Id.* The respondent presented uncontradicted evidence of the high turn-over rate among drivers, and this Court held that, "as a result of the passage of time and the unusually high attrition rate among drivers in the industry, the harm which the Board seeks to prevent has for all intents and purposes already occurred and the injunctive relief which it requests would not restore the *status quo*." *Id.* at *4 (citing *Solien v. Merchants Home Delivery Service, Inc.*, 557 F.2d 622 (8th Cir.1977)). Furthermore, the nature of the requested injunction influenced the court's determination of whether such relief was "just and proper." The Court noted that petitioner had asked for an injunction incorporating the general duty already imposed by the Act. Such an order would likely culminate in a contempt proceeding in which the Court would be called upon to decide the very issue which Congress has entrusted to the Board, to wit: "Whether under the unique facts of this case the respondent is guilty of an unfair labor practice." *Id.* Because "the granting of the requested relief would not preserve the ultimate remedial power of the Board but would in effect be a substitute for the exercise of that power," the court denied the request for a 10(j) injunction. *Id.*; *see also Voith Indus. Servs.*, Inc., 551 F. App'x at 834 (denying 10(j) injunction where interim relief requested would not represent a return to the *status quo*).

As in *Frye*, this is not a case in which Mike-sell's took action that can be easily rescinded pursuant to a Court order. Assuming the Company could rescind its distributor agreements, the drivers who previously worked those routes have since resigned or retired, and there is no guarantee they would want to return and drive their former routes. Ultimately, Petitioner is asking the Court to enter an injunction that incorporates a general duty already imposed on Mike-sell's, so any order requiring bargaining or the production of information would simply duplicate those requirements already prescribed by the Act. As a result, the granting of the requested relief would not preserve the ultimate remedial power of the Board but would in effect be a substitute for that power. Accordingly, a 10(j) injunction would not be proper.

B. The relief sought by the Petition would impose an undue hardship on Mike-sell's, its bargaining unit employees, and its distributors.

Petitioner seeks an interim order requiring Mike-sell's to rescind the sale—and related distributor agreements—of four routes. This would impose extreme undue hardship on a small, family-owned business like Mike-sell's, as well as the distributors who purchased its routes. Not only would such an order require the Company to interfere with (or commit breach of) its contractual relationships with distributors, it would require the reacquisition of all equipment necessary for servicing those routes, including delivery vans, handheld scanners, and other expensive tools and equipment that have already been disposed of—and the capital from which has already been reinvested in an overhead conveyor. Moreover, requiring Mike-sell's to rescind its contracts with distributors would have negative effects on the efficiency, competitiveness, and goodwill of Mike-sell's as well as its distributors. Indeed, the very purpose of the route sales to begin with was to improve profitability by shifting the Company's focus and resources from distribution to manufacturing and branding. try and solve the economic loss resulting from increased competition from larger companies that have the ability to price smaller concerns out of business. Rescinding these contracts would force Mike-sell's to sustain serious financial hardship, and it would also inject instability and uncertainty into customer relations, interrupting the continuity of service that retail and wholesale customers have come to expect.

In *Detroit Newspaper Agency*, 154 F.3d at 280, the court of appeals upheld a ruling by the district court denying the issuance of a 10(j) injunction. The Sixth Circuit emphasized the financial hardship an injunction would work on the employer and replacement employees, noting that while the "extent of such hardships is debatable, … [it] would clearly be significant." *Id.* Such equitable considerations weighed "substantially in favor" of a denying the requested injunction. *Id.*

Similarly, in *Kentucky May Coal Co.*, 1994 WL 739464, at *4, the district court denied issuing a 10(j) injunction because it was "undisputed that the injunction requested [would] substantially burden" not only the respondent but also the employees. The court explained that "if the subcontract is rescinded and respondent is forced to resume operations . . .[the company] stands to lose approximately forty percent of its total business plus considerable initial costs which it incurred in commencing [subcontracting] operations[.]" *Id.; see also Am. Church, Inc.*, 2005 WL 1389042, at *3.

Here, as in the cases cited above, there can be no doubt that requiring the Company to rescind its contracts with distributors would have significant economic consequences, substantially burdening not only Mike-sell's but the distributors and customers with whom it contracts. Clearly, equitable considerations favor a denial of the request for injunctive relief. The Board's proposed remedy would cause significant hardship to both the Company, the independent distributors, and the community at large. If Mike-sell's is required to rescind its contracts with independent distributors, there can be little doubt that the Company will suffer extreme and unexpected financial consequences that could easily put a small, family-run enterprise out of business. This, in turn, would make it all the more likely that large food conglomerates will dominate the market, causing a decrease in competition and free choice, and driving up prices. Because of the dramatic and irreparable nature of the requested remedy, it would be unjust to institute such a remedy prior to the conclusion of Board proceedings.

In contrast, the harm to the Union, if any, would be relatively insignificant if the court declined to enter an injunction. The Board's delay before seeking a preliminary injunction implies a lack of urgency and lack of potential harm. And, indeed, any alleged harm to the union has already occurred, and it is unlikely that any further harm will result while the parties await final action by the Board.

Ultimately, the requested remedy does not represent a return to the *status quo*, but instead would place an undue burden on the Company, its independent distributors, its customers, its employees, and the overall public interest. Such an extreme remedy is neither just nor proper. Accordingly, the petition should be denied. *See Detroit Newspaper Agency*, 154 F.3d at 280 (denying injunction where such would create a financial hardship on replacement employees); *Voith*, 551 F. App'x at 833 (denying injunction where requested relief would include displacing current UAW-represented employees).

C. Interim relief is not necessary to preserve the Board's remedial powers.

Petitioner provides no evidence that injunctive relief is necessary to preserve the Board's remedial power. Specifically, there is nothing extraordinary about this case that would distinguish it from any other case that may appear before the Board. Moreover, there is no evidence that the Board, following the proper resolution of the underlying unfair labor practice allegations, would not be capable of fashioning an adequate remedy. Petitioner goes to great lengths to argue that the sale of routes has "undermined employee support for the Union." (Memorandum – ECF 1-1, p. 5.) But the mere suggestion that employees may become displeased with the Union is simply not enough to justify the extraordinary remedy of issuing a 10(j) injunction. Indeed, in <u>every</u> unfair labor practice case, there is some risk that employees will become impatient, disinterested, or even irritated during the process.

For example, in *Am. Church, Inc.*, 2005 WL 1389042, at *4, the petitioner argued that an injunction was necessary following a withdrawal of recognition. According to the petitioner, "the longer the Union goes unrecognized during the pendency of the Board proceedings, the Union's standing with its members is likely to erode." *Id.* As evidence of this alleged harm, the petitioner submitted testimony that some members had stopped paying their union dues because they no longer felt the union "was able to do anything for them." *Id.* Rejecting the petitioner's claim, and denying the preliminary injunction, the court explained that "[a]ny loss of dues the Union may experience during the pendency of the Board proceedings is a monetary claim that can be remedied at the resolution of this case." *Id.* The court further held:

> As for the alleged harm to the prestige and legitimacy of the Union, there is no evidence in this case that this harm would either be irreparable or continuing if the Board eventually rules in favor of the Union. While, as the Petitioner argues, it is both predictable and understandable that members may be likely to stop paying dues to a union that is not currently recognized by their employer, and therefore, may be seen as providing no service to the employees, ***there is no evidence that these same members would be unwilling or unlikely to support the union if the Board eventually determines that recognition was illegally withdrawn and union benefits must be restored***. Without ***convincing*** evidence that the Union's loss of support is permanent and cannot be restored if the Board orders American Church to recognize the Union and honor the contract benefits, this case presents no unique harm that would separate it from any other case before the Board. Therefore, no injunction is warranted under the standard set by the Sixth Circuit for reviewing a 10(j) injunction request.

Id. (emphasis added); *see also California Pac. Med. Ctr.,* 991 F.2d at 544 (Board's final order likely to be as effective as an order for interim relief where union's membership had already been significantly depleted by the time the Board petitioned for an injunction, and it was unlikely that any further harm would result while the parties awaited final action by the Board).

Here, as in *Am. Church*, there is no evidence, let alone ***convincing evidence***, that the alleged harm to the Union would either be irreparable or continuing if the Board eventually rules in favor of the Union. Indeed, while it is predictable that certain employees may "shun the union" now, as suggested by Petitioner, there is no evidence that these same employees would be unwilling or unlikely to support the union if the Board eventually determines that the routes were illegally sold and that the contracts must be rescinded. Absent the provision of such evidence, no injunction is warranted under the standard set by the Sixth Circuit, and the Union's Petition for 10(j) injunction should be denied.

CONCLUSION

For the foregoing reasons, Respondent Mike-Sell's Potato Chip Company respectfully requests the Court deny the Regional Director's Petition for Injunctive Relief.

Respectfully submitted,

/s/ Jennifer R. Asbrock
Jennifer R. Asbrock (Ohio #0078157)
jasbrock@fbtlaw.com
Catherine F. Burgett (Ohio # 0082700)
cburgett@fbtlaw.com
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 779-8630
Facsimile: (502) 581-1087
Counsel for Mike-sell's Potato Chip Co.

CERTIFICATE OF SERVICE

I hereby certify that this Memorandum in Opposition to Petition for 10(j) Injunction was electronically filed with the U.S. District Court for the Southern District of Ohio by using the CM/ECF system, which will send a notice of electronic filing to the following, with hard copies served as follows on this 3rd day of May, 2017:

Garey E. Lindsay, Regional Director
Linda Finch, Counsel for the General Counsel
National Labor Relations Board Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
(via email at Linda.Finch@nlrb.gov)

John R. Doll, Counsel for Charging Party
c/o Doll, Jansen, Ford & Rakay
111 W. First St., Suite 1100
Dayton, Ohio 45402-1156
(via email at jdoll@djflawfirm.com)

Office of the General Counsel
c/o National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(via U.S. mail)

/s/ Jennifer R. Asbrock
Jennifer R. Asbrock
Counsel for Mike-sell's Potato Chip Co.

EN11783.Public-11783 4820-8108-5255v1

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
PLAINTIFF-PETITIONER,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**AFFIDAVIT OF PHILIP KAZER**
DEFENDANT-RESPONDENT.	)	

The Affiant, Philip Kazer, after first being duly sworn, hereby states and affirms the following:

1. My name is Philip Kazer. I am of lawful age, and I am competent to attest to the facts stated in this Affidavit, which are true, correct, and based on my own personal knowledge.

2. I am employed by Defendant-Respondent Mike-Sell's Potato Chip Company ("Mike-sell's" or "Company") and have been so employed since August 1, 2012. Since my hire, I have held the position of Executive Vice President of Sales and worked at the Company's principal place of business in Dayton, Ohio.

3. Mike-sell's is a privately-held manufacturer of snack foods headquartered in Dayton, Ohio.

4. For over 100 years, Mike-sell's has manufactured and packaged snack products at its Dayton plant and then distributed them to retailers in Ohio, Indiana, Kentucky, Illinois, Michigan, and Pennsylvania through the help of route sales drivers ("drivers") and independent distributors ("distributors").

5. Drivers are employed as part of the Company route sales division. They are commissioned employees of Mike-sell's whose duties include loading trucks, traveling to customer locations, stocking shelves, taking retail inventories and replenishing product, performing point-of-sale marketing, and rotating and removing unsold or expired product.

6. In contrast, distributors are independently-owned businesses that take on the entire risk of loss by choosing the type and amount of product to market, buying that product outright from Mike-sell's, preparing merchandise displays, delivering, and re-selling the product to customers in order to recoup their own costs and (hopefully) make a profit. For sales territories or "routes" serviced by distributors, Mike-sell's

DEFENDANT'S EXHIBIT
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essentially sells the right to market its product within a specified geographic area, and the distributors purchase Company product up-front and are thereafter the owners of that inventory and all the liability that comes with it.

7. On the whole, distributors have historically been responsible for servicing a far greater sales territory—and distributing far more Company product—than drivers. However, unlike Mike-sell's drivers, distributors are not actually required to follow any particular route or schedule, or to service any particular customer, within their individual sales territory.

8. Company drivers are represented by the Union, and their employment was formerly governed by a labor agreement effective November 17, 2008, to November 17, 2012 ("Expired Contract").

9. From November 18, 2012, through June 12, 2013, drivers worked under the Company's unilaterally-implemented last, best, and final offer ("Final Offer").

10. Since June 13, 2013, however, drivers have worked under the Company's revised last, best, and final offer ("Revised Final Offer"), which Mike-sell's contends was lawfully implemented after the parties reached a good faith impasse in June 2013.

11. Mike-sell's has been in business for over a century, but since about 2006, significant losses have forced the Company to rethink its business plan. The main reason for these losses is the competitive imbalance between Mike-sell's and its larger competitors, such as Frito-Lay and private-label brands. Unlike Frito-Lay and private-label brands, Mike-sell's cannot afford to intentionally discount its product so deeply as to take a temporary loss in order to steal away coveted shelf space and sales volume from smaller companies. The Company's financial condition and competitive struggle are not unique in its industry. Across the country, local snack manufacturers consider Frito-Lay and private-label brands to be very large, fierce competitors with the ability to price local concerns out of business.

12. One of the Company's key strategic objectives is to focus more on manufacturing and branding quality products, which is its biggest strength and most promising area for growth and profitability.

13. Mike-sell's is not interested in growing its Company route sales division, which has lost money hand-over-fist for more than a decade. For example, during the 11-year period spanning from 2006

through 2016, the Company route sales division suffered a loss every year except 2009. The total division losses during that 11-year period exceeded $9.4 million, whereas the meager division profits in 2009 barely surpassed $213,000. Mike-sell's also suffered an overall operating loss in all but three of these 11 years, although overall losses for the entire 11-year period were less than $5 million.

14. The Company has gradually reduced its Company route sales division by selling certain routes to distributors who purchase the product up-front, directly from Mike-sell's—thereby accepting the entire risk of loss—and have the exclusive right to re-sell those products as they see fit to retail and wholesale customers within their designated area.

15. The number of drivers has further declined over the past five years, partially due to the sale of routes and partially due to route consolidations/mergers. Mike-sell's currently employs 14 drivers who collectively serve 12 routes. The rest of the Company's approximately 174 routes are serviced by 34 distributors.

16. After the Paolucci Award issued, the Company route sales division continued to flounder, as evidenced by the Profit-and-Loss Statements for the Company's entire route sales division for recent years, all of which were provided to the Union and reflect large-scale losses.

17. On November 18, 2012, Mike-sell's sold 16 Cincinnati routes, 10 Columbus routes, and 3 Sabina routes to Buckeye Distributing. About six months later, Mike-sell's sold 5 Greenville routes to Gaudio Distributing effective June 1, 2013. The Company then sold 4 Springfield routes to Helm Distributing on August 18, 2013. Mike-sell's notified the Union of each elimination decision and its effective date, and the Company further offered to bargain over any effects. The Union neither requested to bargain nor filed a grievance or unfair labor practice charge to challenge the route eliminations.

18. The route eliminations referenced in the previous paragraph of this Affidavit collectively reduced Company route sales division losses by more than 70%, improving from a loss of almost $1.8 million in 2012 to a loss of about $533,000 in 2013. This, in turn, drastically reduced the Company's overall operating loss by more than 90%, going from a loss of over $1.8 million in 2012 to a loss of about $112,000 in 2013.

19. Several of the routes referenced in the two previous paragraphs of this Affidavit were later returned to Mike-sell's and thereafter re-sold to new distributors. For example, Helm Distributing returned the 4 Springfield routes and Gaudio Distributing returned the 5 Greenville routes after servicing them for a couple years, and Mike-sell's thereafter re-sold all 9 Greenville/Springfield routes to Big TMT Enterprize LLC in December 2015. Mike-sell's notified the Union of each elimination decision and its effective date, and the Company further offered to bargain over any effects. The Union neither requested to bargain nor filed a grievance or unfair labor practice charge to challenge the route eliminations.

20. In April 2016, Mike-sell's announced it would explore the possibility of selling more routes to distributors. Mike-sell's wanted to explore opportunities for "operational and strategic business changes" that may allow the Company "to further enhance its focus on manufacturing and branding." By letter to the Union dated April 27, 2016, Mike-sell's promised to "provide . . . timely notice of its decision" and "honor its obligation to bargain over the effects of the route elimination(s)." The Union filed a grievance to challenge the Company's intent to sell additional routes, citing several provisions of the Expired Contract that would allegedly be violated if any route sales came to fruition. However, the Union made no demand to bargain over the issue. Mike-sell's processed the Union's grievance, but there was no labor contract under which to arbitrate.

21. On July 11, 2016, Mike-sell's notified the Union in writing of its decision to sell Route 102, covering the area around greater Xenia, Ohio. The Union raised no objection to this decision, nor did the Union demand to bargain or file a grievance to challenge it.

22. On August 29, 2016, Mike-sell's notified the Union in writing of its decision to sell Routes 104 and 122, covering territory in Bellbrook and Beavercreek, Ohio. The Union filed a grievance to challenge the sale of both routes. (Once again, Mike-sell's accepted and processed the grievance, but there was no labor contract under which to conduct arbitration.) The Union also sent Mike-sell's a letter demanding to bargain over the decision to eliminate Routes 104 and 122, as well as seeking documents purportedly necessary for the requested decisional bargaining.

23. On September 12, 2016, Mike-sell's replied to the Union's demand, declining to engage in decisional bargaining over elimination of the routes and further declining to produce information requested

for the specific purpose of such decisional bargaining. (Just a few days earlier, Mike-sell's had already given the Union requested copies of Profit-and-Loss Statements for the Company's Route Sales Division for multiple years.) The Company explained its position in detail, citing specific passages from the Paolucci Award. However, Mike-sell's also reiterated its willingness to bargain over the effects of any route eliminations, as well as its willingness to produce information relevant or necessary for the Union to perform its statutory duty to bargain over mandatory subjects.

24. The Union never requested to engage in effects bargaining over the decision to eliminate Routes 104 and 122. In any event, the sales of the four routes coincided with drivers' resignations or retirements, so there were no layoffs—just a rebid of routes.

25. On September 12, 2016, Mike-sell's notified the Union in writing of its decision to sell Route 131, covering territory in Middletown and Springboro, Ohio. The Union filed a grievance over the sale of Route 131, as well as the pending Charge challenging the elimination of all four routes since July 2016. Once again, Mike-sell's accepted and agreed to process the grievance, but there was no labor contract under which to conduct an arbitration.

26. The elimination of Routes 102, 104, 122, and 131 collectively resulted in the one-time liquidation of Company assets valued at $127,400, as well as annual savings of at least $73,240 for non-labor expenses. The route eliminations also resulted in about $65,000 in labor cost savings for pension contributions, healthcare, workers' compensation premiums, and paid time off benefits, but these savings were completely offset by the higher cost of distributor margins as compared to the lower cost of driver commissions and/or weekly minimums.

27. For a regional family business like Mike-sell's, with total net assets of only $5.8 million,[1] the one-time capital recoupment combined with the annual savings meant that over $200,000 would be returned to Company coffers within 12 months.

28. Projecting the 2016 route eliminations to increase the Company's net worth by almost 3.5% in the first year alone, Mike-sell's had newfound confidence to reallocate resources and make major

[1] Net shareholder equity as of April 1, 2017, was $5,817,522.

improvements in its manufacturing plant. In February 2017, for example, Mike-sell's invested over $260,000 to build and install a new overhead conveyor system in its manufacturing plant. The Company's old system was still functioning as designed, but as compared to modern technology, it operated very slowly, produced excess waste and noise pollution, and often required expensive maintenance and increasingly hard-to-find parts. Since its installation in February 2017, the new overheard conveyor has increased overall efficiency and reduced down time, waste, and maintenance costs.

29. The four route eliminations in 2016 also reduced the time managers spend running routes to cover for unplanned driver absences, a distraction consuming about 55 workdays per year before the route sales but only about 14 workdays per year after the route sales.[2] Since recapturing an estimated 41 management workdays—about two full work months—per year, Mike-sell's has been able to significantly increase the time dedicated to calling on high-volume clients, selling incremental displays, managing customer relations concerns, updating point-of-sale merchandising and resetting retailer shelves, promoting new products, and generating new accounts.

30. Mike-sell's has never sold routes for the purpose of discriminating against the Union or eroding its support. In fact, Mike-sell's planned all route eliminations in 2016 to coincide with resignations or retirements, so this natural attrition avoided the need for layoffs.

31. The Company's sale of routes historically serviced by drivers represents a fundamental change in the scope and direction of its enterprise. Because each individual route can be tracked separately for financial purposes, the sale of each route is analogous to the liquidation of a separate business unit, with the overall goal to increase profitability by freeing-up resources consumed by the Company route sales division and reallocating them to manufacturing and branding.

32. Mike-sell's made no discriminatory remarks or plans to oust the Union, nor did the Company's actions equate to subcontracting. Mike-sell's changed its basic operations for four individual routes historically run by drivers, essentially selling the separate business units handling distribution for those areas.

[2] These before-and-after estimates are based on an average of full-year absenteeism statistics for 2014 and 2015 versus partial-year absenteeism statistics (annualized) for 2016 and 2017.

33. This strategic change in the scope and direction of the Company's business resulted in a partial liquidation and recoupment of capital investment, as well as new revenue. That is, Mike-sell's sold its delivery trucks and the sales territory they serviced, which did not perfectly match the former routes. Mike-sell's also leased its handheld scanners to distributors, who began taking title to Company product upon receipt. This arrangement essentially reversed the order in which Mike-sell's realizes revenue by selling product up-front and retaining no legal interest in it, thereby shifting the entire risk of loss to the distributor. The Company's recouped capital and newfound revenue was, in turn, reinvested in core manufacturing and branding initiatives, two activities at the heart of the business. To require bargaining over the decision to close individual business units and/or redistribute assets and capital would greatly abridge the Company's freedom to manage its enterprise.

34. Mike-sell's sold and re-sold its driver-serviced sales territory to distributors on at least four dozen occasions during the seven-year period preceding the route eliminations at issue. More than three dozen of these route sales occurred after the end of the Expired Contract term, and while the Union received advanced notice of them, it neither demanded to bargain nor filed a grievance or unfair labor practice charge. Thus, the Union knowingly acquiesced in the Company's unilateral sale of over four dozen routes between 2009 and 2016—with more than three dozen sales occurring after the Expired Contract ended.

35. The Route Bidding Articles in the Expired Contract and Revised Final Offer are separate from, and unrelated to, the Management Rights Articles. Regardless of whether the Expired Contract or the Revised Final Offer was in place when the four routes were sold, their Route Bidding Articles contain substantively indistinct route elimination provisions. Moreover, the proposed Route Bidding Articles in the Company's Final Offer versus Revised Final Offer are identical.

36. Despite voicing displeasure with the Paolucci Award and dismay with distribution center closures during at least three bargaining sessions in October and November 2012, the Union nevertheless specifically proposed to keep the very same language in the Route Bidding Article that Arbitrator Paolucci had already interpreted to permit the Company's sale of routes.

37. During at least four bargaining sessions after the Expired Contract ended and the Company's Final Offer was implemented, the Union again proposed reinstating the Route Bidding Article that Arbitrator Paolucci found to allow unilateral route eliminations. Although the Paolucci Award did not rely on the Expired Contract's Management Rights Article, the Union also proposed to maintain the very same language in that provision as well.

38. While the Union filed a grievance claiming various violations of the Expired Contract, it failed to actually demand bargaining after Mike-sell's announced the potential for more route eliminations in April 2016.

39. Despite receiving advance written notice of the sale of Route 102 in July 2016, the Union never demanded to bargain over that route elimination nor filed a grievance to challenge it.

40. The Union's August 31st information request, which was made for the specific purpose of bargaining over the Company's decision to eliminate routes in order to effect a change in distribution methods.

AFFIANT FURTHER SAYETH NAUGHT.

Philip Kazer, Executive Vice President of Sales
Mike-sell's Potato Chip Company

STATE OF OHIO)
COUNTY OF MONTGOMERY)

Subscribed and sworn to before me by Philip Kazer on this 3rd day of May, 2017.

Sharon E. Nuckles

Notary Public, State at Large

My Commission Expires: Sept. 20, 2020

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION (DAYTON)

GAREY E. LINDSAY, Regional Director of Region 9 of the NLRB, for and on behalf of the NLRB,	)	***ELECTRONICALLY FILED***
PLAINTIFF-PETITIONER,	)	**CASE NO. 3:17-cv-00126-TMR** **The Honorable Thomas M. Rose** **Magistrate Michael J. Newman**
v.	)	
MIKE-SELL'S POTATO CHIP CO.,	)	**AFFIDAVIT OF MARK PLUMMER**
DEFENDANT-RESPONDENT.	)	

The Affiant, Mark Plummer, after first being duly sworn, hereby states and affirms the following:

1. My name is Mark Plummer. I am of lawful age, and I am competent to attest to the facts stated in this Affidavit, which are true, correct, and based on my own personal knowledge.

2. I am employed by Defendant-Respondent Mike-Sell's Potato Chip Company ("Mike-sell's" or "Company") and have been so employed since 1986. For more than a decade, I have held the position of Zone Manager and worked at the Company's principal place of business in Dayton, Ohio.

3. In 2011, Mike-sell's employed about 80 drivers. In 2012, the Company was forced to close three distribution centers and sell dozens of routes to distributors, reducing its workforce to around 35 drivers.

4. In early 2009, one route was sold to Snyder's of Berlin. The displaced driver had the chance to bump into another route, but she chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge.

5. In late 2009, Mike-sell's sold two routes to Ohio Citrus. Both displaced drivers could bump into other routes, but one chose to resign. The Union was notified of the decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge.

6. In late 2010, Ohio Citrus returned the two routes it purchased in 2009. Mike-sell's brought one route back in-house and reassigned it to a driver, but the other route was re-sold to Snyder's of Berlin.

DEFENDANT'S EXHIBIT
tabbies
B

The Union was notified of these decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge.

7. In mid-2011, Snyder's of Berlin returned the route it purchased in 2010. Mike-sell's no longer wanted to service the area, so it was mainly abandoned, except for a small segment that was merged into an existing route. The Union was notified of this decision, but neither requested to bargain nor filed a grievance or unfair labor practice charge.

8. In August 2011, Mike-sells sold the newly-merged route, as well as one other route, to Buckeye Distributing. Each displaced driver bumped into another route. The Union was notified of these decisions, but neither requested to bargain nor filed a grievance or unfair labor practice charge.

9. The Company's right to change distribution methods by selling routes to distributors was confirmed in 2012, through an arbitration award issued by Arbitrator Michael Paolucci ("Paolucci Award"). The Paolucci Award was issued during the term of the Expired Contract, and a true and complete copy of the Award is appended hereto as Attachment 1.

10. The grievance before Arbitrator Paolucci marked the first time the Company's decision to sell routes had been challenged, and the Union cited Article I (Recognition), Article II (Union Security), and Article VIII (Seniority) of the Expired Contract to support its grievance. The Union demanded, as a remedy, that Mike-sell's bargain over the decision and its effects.[1] After a full evidentiary hearing, Arbitrator Paolucci denied the grievance based on Section 5 of Article VIII-B (Route Bidding) of the Expired Contract,[2] as well as the Company's inherent entrepreneurial right to determine the nature, scope, and direction of its enterprise, and the manner in which it conducts business. (See Attachment 1.)

11. Arbitrator Paolucci's Award seems to inadvertently confuse <u>the number of routes</u> owned/serviced by distributors with <u>the number of distributors</u> who own/service the routes. (See Attachment

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[1] While its first grievance was pending, the Union filed an identical grievance to challenge a Greenville route sold in May 2012. After the Paolucci Award was issued, the Union withdrew its grievance challenging the elimination of the Greenville route.

[2] Article VIII-B - Section 5 of the Expired Contract provides (in part): "In the event that it becomes necessary to <u>eliminate a route</u> or combine one route with another, employees affected shall have the right to displace a less senior employee."

1, p. 5.) It is common for several routes to be owned/serviced by one distributor. Thus, as of June 27, 2012 (i.e., the date of the arbitration), Mike-sell's had 45 distributors that collectively owned/serviced 130 routes.

12. The Paolucci Award emphasized that Mike-sell's transfers both the risk and potential reward by selling routes to distributors, which distinguishes the situation from typical subcontracting. (See Attachment 1, p. 17.) Because an entire sales territory—or business unit—is sold to a third party, Mike-sell's "reduce[s] its involvement to that of a supplier." (See Attachment 1, p. 17.) Unlike a subcontracting arrangement, the decision to sell routes necessarily involves a calculation of multiple factors beyond mere cost savings, such as return on investment and net impact on profitability of the whole enterprise. (See Attachment 1, pp. 17-18.) It essentially involves "a whole new method of doing business," whereby Mike-sell's "loses all control" of the distribution. (See Attachment 1, pp. 18-19.)

13. The Paolucci Award further confirmed that Article VIII-B of the Expired Contract—which permits Mike-sell's to "eliminate a route"—applies equally where routes are entirely abandoned and where routes are sold to distributors. (See Attachment 1, p. 20.) And while not requiring route eliminations to be financially justified, the Paolucci Award nevertheless recognized the untenable situation that could result if the grievance were sustained: Mike-sell's could be "forced to keep non-performing assets (in the form of a route)" and "forced to continue a business activity that loses money every day." (See Attachment 1, p. 18.)

14. As the Paolucci Award recognized, when Mike-sell's sold its routes, the Company "transferr[ed] the expense and the potential revenue to a third party," thereby "removing the risk and reward from its purview." (See Attachment 1, p. 17 (emphasis in original).) Hence, "[i]n losing control of the business [unit], and the business decisions, the Company has reduced its involvement to that of a supplier." (See Attachment 1, p. 17.)

15. Mike-sell's sold and re-sold its driver-serviced sales territory to distributors on at least four dozen occasions during the seven-year period preceding the route eliminations at issue. More than three dozen of these route sales occurred after the end of the Expired Contract term, and while the Union received advanced notice of them, it neither demanded to bargain nor filed a grievance or unfair labor practice charge.

Thus, the Union knowingly acquiesced in the Company's unilateral sale of over four dozen routes between 2009 and 2016—with more than three dozen sales occurring after the Expired Contract ended.

AFFIANT FURTHER SAYETH NAUGHT.

Mark Plummer, Zone Manager
Mike-sell's Potato Chip Company

STATE OF OHIO)
COUNTY OF MONTGOMERY)

Subscribed and sworn to before me by Mark Plummer on this 3rd day of May, 2017.

Sharon E Merker

Notary Public, State at Large

My Commission Expires: Sept. 20, 2020

IN THE MATTER

OF

ARBITRATION

BETWEEN

MIKE SELLS POTATO CHIP COMPANY OF DAYTON, OHIO

AND

TEAMSTERS
LOCAL NO. 957

Grievances:	Angie Watson; Route Elimination
Date of Hearing:	June 27, 2012
Location:	Thompson Hine Dayton Law Offices
Case No:	121212-51687-6
Date of Award:	September 26, 2012
Finding:	The Grievance is denied.

Union Representative:

John R. Doll
Doll, Jansen, Ford & Rakay
111 W. First Street, Suite 1100
Dayton, Ohio 45402-1156

Employer Representative:

Jennifer Asbrock
Thompson Hine
Austin Landing I
10050 Innovation Drive
Suite 400
Dayton, Ohio 45342-4934

OPINION AND AWARD

Michael Paolucci
Arbitrator

ATTACHMENT
1

Administration

By letter dated December 27, 2011, from John R. Doll, the Union's Attorney, the undersigned was informed of his designation to serve as arbitrator in an arbitration procedure between the Parties. On June 27, 2012, a hearing went forward in which the Parties presented testimony and documentary evidence in support of positions taken. The record was closed upon the submission of post-hearing briefs from both Parties, and the matter is now ready for final resolution.

Grievance and Question to be Resolved

The following Grievance (Joint Exhibit – 2) was filed on November 9, 2011, and is the pertinent subject matter of this dispute.

* * *

> **GRIEVANCE:** (give dates) This grievance is being filed by the Local on behalf of the Sales employees of Mike-Sells Potato Chip Company of Dayton, Ohio under Article I, Article II and Article VIII of the Collective Bargaining Agreement. The Company has stated to employee Angie Watson that her route will be transferred to an independent operator. The Company is in violation of Articles I, II and VIII of The Collective Bargaining Agreement. I request that the Company bargain over the decision to transfer this route and work to an independent operator and the effects of the decision prior to taking any action. Further facts to be presented at hearing.

* * *

The questions to be resolved are whether the Company violated the Agreement when it sold the Grievant's route to a third party, who then began performing the work that had been done by the Grievant; and if so, what should the remedy be?

Cited Portions of the Agreement

The following portions of the Parties' Collective Bargaining Agreement (Joint Exhibit – 1), hereinafter "Agreement", were cited:

* * *

ARTICLE 1
RECOGNITION – UNION MEMBERSHIP

Section 1 The Company agrees to recognize and hereby does recognize the Union, its designated agents and representatives, its representative successors and/or assigns, as the sole and exclusive bargaining agent on behalf of all the employees of the Company in the following described bargaining unit: all Sales Drivers, and Extra Sales Drivers at the Company's Dayton Plant, Sales Division, and at the Company's Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over-the-road Drivers employed by the Company, but excluding all supervisors, security guards, and office clerical employees employed by the Company.

ARTICLE II
UNION MEMBERSHIP AND SECURITY

Section 1 The Employer agrees that as a condition of employment, on or after the thirtieth (30^{th}) day following the beginning of such employment or the effective date of the Agreement, whichever is later, all employees in the bargaining unit covered by this Agreement shall become and/or remain members of the Union within the limitations and subject to the conditions set forth in Section 8(a)(3) of the National Labor Relations Act, as heretofore or hereafter amended.

Section 2 The Company agrees that when it needs additional employees in the bargaining unit, it shall make a reasonable attempt to contact the Union in order to obtain additional employees to fill such positions. However, the Company shall not be required to hire those individuals referred by the Union.

* * *

ARTICLE VIII
SENIORITY

Section 1 Seniority is defined as the length of an employee's most recent period of service with the Company beginning with the last day the employee began work as a full-time bargaining unit employee of the Company. Seniority shall be the basis for all worked covered by this Agreement.

Section 2 An employee shall be considered to be on probation and shall not be entitled to any seniority rights until said employee has been continuously employed by the Company for a period of sixty (60) days.

* * *

ARTICLE VIII-B
ROUTE BIDDING

* * *

Section 5 In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

* * *

ARTICLE XIX
MANAGEMENTS RIGHTS

Section 1. Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplining for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of lack of work or economic reasons, or other reasons beyond the control of the Company, the right to improve manufacturing methods, operations and conditions and distribution of its products, the right to maintain discipline and efficiency of employees is exclusively reserved to the Company. It is understood however, that this authority shall not be used by the Company for the purpose of discrimination against any employee because of their membership in the Union, and that no provision of this paragraph shall in any way interfere with, abrogate or be in conflict with any rights conferred upon the Union or its members by any other clause contained in this Agreement, all of which are subject to the grievance procedure.

* * *

* * *

Factual Background

The Company is a manufacturer of snack foods, is headquartered in Dayton, Ohio, and has two (2) production facilities – one in Dayton, Ohio and the second in Indianapolis, Indiana. In addition, it operates a distribution center in Columbus, Ohio, also referenced as the Columbus Distribution Center. The Company's "Route Sales Drivers", among other employees, are represented by the Union. The Grievant, prior to resigning because of being transferred, had worked for the Company since March 28, 1994, or approximately eighteen (18) years.

The dispute involves the Company's sale of the work that the Grievant performed to an independent third party. There was some dispute as to the proper terminology to use with regard to the third party and the transaction that had taken place. The Grievance, and thereby the Union, referred to the work as being subcontracted to an independent operator. The Company objected and claimed that the route was "sold" to an independent distributor. There was no real dispute as to what occurred, and so the proper terminology will be considered as the case is discussed.

The Company distributes its products throughout Ohio, Indiana, Kentucky, Illinois, and Michigan. It distributes the product in two (2) methods – through its employees in the position of Route Sales Drivers (hereinafter "RSD's"), and through independent distributors. It has about eighty (80) RSD's and over one hundred (100) Independent Distributors. It also uses three (3) over the road drivers who make larger deliveries to warehouses, stand-alone storage bins, and distribution centers. These employees are not part of the dispute and will not be discussed further. The storage bins are used as a drop point for product where over the road drivers will leave product, and where RSD's will pick up product for servicing their route. In this way the storage bins act as mini-distribution centers and allow the RSD's to pick up their product nearer to their route than if the distribution centers were used.

RSD's are responsible for loading their trucks; traveling to customer locations; stocking shelves; doing point-of-sale marketing, increasing sales, rotating unsold product, and removing expired product from shelves. The Company introduced evidence that the competition in the snack food industry has begun to put pressure on it to become more efficient to remain profitable. It argued that the larger companies (e.g. Frito-Lay) are dominating, and are squeezing smaller companies that do not change with consumer demand. The expectations in the industry are for manufacturers to continue producing fresher products, but at lower prices. To remain competitive the Company is focused on reducing costs since it has been difficult to solely rely on higher sales volumes.

One method of remaining competitive is for the Company to change distribution methods from direct store delivery to independent distribution – especially for outlying sales routes. The outlying routes are farther from the distribution centers and therefore have extra costs for remote RSD's, storage bins, and over-the-road drivers to service the bins. These extra costs sometimes cause outlying routes to become unprofitable since the extra costs do not support ongoing direct sales. The Company showed that when a route becomes unprofitable it will first attempt to increase profitability before eliminating it. As an example, the Company' Zone Sales Manager testified that special promotions will be offered, routes are restructured to improve efficiency, and it will enter partnerships with other businesses. In addition, the Company will send managers into the field to attempt to solicit new business from more stops, and thereby increase sales.

However, when the route becomes untenable the Company will sell the route to a third party - or independent distributor. In this way the risk is shifted to the third party, and the unprofitable route is turned around. The Company claimed that it has made this type of unilateral decision before, and it has become routine for the Columbus Distribution Center. It presented evidence that in the past when a route has been sold to a third party, the RSD who is displaced because of the elimination of his/her route is offered the opportunity to bump into other routes within the Columbus Distribution Center. The Company claims that this is directly addressed in Article VIII-B of the Agreement, and argues that there is no dispute that the Company has the right to unilaterally create and eliminate sales routes – as it did here.

The Company showed that the third party that purchases a route will take on the risk by choosing the specific product to be marketed, by determining the amount of each product to be marketed, by purchasing the product directly from the Company, and through promoting and re-selling the products to earn the cost back. It cited specific instances where routes were sold and then eliminated, as follows:

- In early 2009 the Mansfield, Ohio route was sold to Snyder's of Berlin. The displaced driver, Nancy Higginsbothom was offered the opportunity to bump into the Columbus Distribution Center, but she chose to resign. The Union was notified of the decision, and no objection was made.

- In late 2009 the Company sold two (2) routes – Newark/Granville/Zanesville and Lancaster/Hocking Hills/Athens to Ohio Citrus. One displaced driver, Patrick Kenny, bumped into the Columbus Distribution Center. The other displaced driver, Jim Philippi, was offered the opportunity to bump but resigned. Again, the Union was notified, but did not object.

- In late 2010, Ohio Citrus gave up the two (2) routes it had bought. The Newark/Granville/Zanesville route was brought back in-house and worked by Ron Page, but the Lancaster/Hocking Hills/Athens route was sold to Snyder's. The Union was notified and did not object.

- In June 2011, Snyder's returned the Lancaster/Hocking Hills/Athens route. Since the Company determined that it could not afford to service the route, it was largely abandoned. The Lancaster portion was added to the new Lexington route that was already covered by in-house Route Sales Drivers. The Union was notified, and did not object.

- In August 2011, the Company sold the Lancaster/New Lexington route and the Newark/Granville/Zanesville route to Buckeye Distributing. Each of the displaced drivers bumped into the Columbus Distribution Center. The Union was notified, and did not object.

This case does not differ much from those cited. Historically, when the Grievant started with the Company she commuted to the Columbus Distribution Center – according to her it was a 136 mile round trip. In order to service the route the Grievant would travel to Columbus twice per week. Ordinarily RSD's are not permitted to take their delivery trucks home. To adapt to the Grievant's commute, the Company permitted her to keep her truck at her residence since she would otherwise have to drive the truck back and forth to service the route each day. The Union pointed out that except for the twice per week travel to Columbus, the Grievant did not have much contact with the Columbus Distribution Center.

Sometime around 1998 (the Company claimed it was in 2000, the correct date is immaterial) the Company began to use a storage bin in Mansfield, Ohio. This allowed the Grievant and other RSD's to drive to Mansfield to pick up their product, instead of commuting to Columbus. The Union cited the fact that once the Company began the Mansfield bin, the Grievant was able to establish another route in the Mansfield area. Another employee was assigned the Mansfield route, and the Grievant continued on the Marion route.

However, Mansfield was still an eighty (80) mile commute for the Grievant, and sometime between 2006 and 2007 the Company opened a storage bin in Marion, Ohio so that the distance for the Grievant's route was that much closer. The Mansfield RSD used the Marion bin for his deliveries. The Union cited different actions the Grievant took as evidence of her worth as an employee. The Company did not dispute that the Grievant, on her own initiative, shoveled snow, and kept the warehouse clean, so that she and other RSD's could more easily access the warehouse. Additionally, the Union cited the increased sales volume that the Grievant was able to achieve in her tenure. It claimed that her success caused the Company to conclude that the volume of the route became too large and her route was cut. The Grievant increased sales volume again. It claimed that in the late summer 2011, the Company removed some accounts from the route and contracted them, without the Grievant's knowledge, to a distributor in West Central, Ohio.

At some point in 2011 the Company determined that the Grievant's route was not profitable, and that despite its efforts to make it more profitable it was not going to succeed. Therefore, it was determined that the route was to be sold. In late October 2011, the Grievant attended a meeting with Sharon Willie, the Company's Director of Human Resources, and Mark Plumber, the Company's Zone Sales Manager. The Union representative was Harry Donnell, the Columbus Distribution Center's Union Steward. The Union's Business Representative, Mike Maddy, was not present. The Grievant was informed that her route was being sold, and that it was to occur in the next three (3) to four (4) weeks. A few days later, the Grievant contacted Maddy to inform him as to what was happening.

In November 2011 the Company sold the Marion route to Buckeye Distributing. The Company had taken efforts over the years to make the route more profitable, and the Grievant confirmed that such efforts had been made during her tenure. By October 2011 the Company concluded that it was losing over $1,100.00 per week on the route, and that such was largely due to the costs of the storage bins and the over-the-road drivers used to deliver product to, what it considered, a remote area of the Columbus Distribution Center territory.

As in other similar situations, the Grievant was given the opportunity to bump into the Columbus Distribution Center. The Grievant initially selected the Grove City route. Because of her seniority she could have bumped any other driver in the center, except one. The Company showed that the Grievant's sales commissions were basically the same for the Grove City route as it had been for her Marion route, and that she actually earned a little more during her short tenure in that position (Company Exhibit – 1). The Company showed, and the Grievant admitted, that there were other routes she could have chosen which would have earned her between $400 and $1,000 more per week. It was not explained why she did not choose these routes.

Since the Grievant continued to live in Marion, Ohio, she became upset that she had to commute to Columbus to pick up her product to be delivered to the Grove City area. The Company pointed out that this was the same commute that the Grievant had made during her first six (6) years of employment. Ultimately the Union filed a Grievance claiming that the failure to bargain over the sale of the Marion route violated the Agreement. The Grievant ultimately resigned after about three (3) weeks, claiming she was losing too much money commuting to Columbus. She testified that she was spending half her paycheck on fuel costs. The Grievant got a job delivering for Nichols Bakery. The matter was processed through the steps of the Grievance Procedure and ultimately was appealed to arbitration hereunder.

Contention of the Parties

Union Contentions

The Union describes the dispute as a straightforward subcontracting issue, and it cites arbitral authority in support of its claim that the Company improperly relied on its management rights to transfer the work. It contends that subcontracting is limited by implication in a collective bargaining agreement, and to find otherwise would render such agreement meaningless. It argues that bad faith on the part of management is not a necessary element of its case, and claims that a company subcontracting must act reasonably. It thus claims that the silence in an agreement does not mean that subcontracting is permitted. It asserts that the implied terms of the Agreement prohibit the subcontracting that occurred here.

The Union claims that there is no factual dispute that what occurred here was the reduction of one bargaining unit position caused by the elimination and transfer of the Marion route. It rejects the position of the Company that the management rights provision allows it to eliminate the route since, followed to its logical end, the result would mean that the Company could eliminate all RSD's and all of their routes by simply subcontracting the work. It contends that this position has been rejected by arbitral authority under long-standing principles. It cites said authority for the proposition that subcontracting out work is not permitted when such is done for the sole purpose of saving on labor costs, or reduced expenses, absent clear contractual authority.

The Union asserts that the decision to transfer the work was not done to "improve manufacturing, methods, operations and conditions in distribution of its products" but instead was simply done based on cost. It argues that this is in conflict with the expectations implicit in the Agreement. It asserts that even if the route was unprofitable, then the Agreement contemplates that the Company could either eliminate the route, or merge it with another. It claims that the Company went outside the Agreement by subcontracting a third party to address the issue. It claims that the result, if the Company were to succeed here, could mean a complete transfer of the work to third parties with all bargaining unit positions being eliminated.

The Union rejects the claim that a binding past practice existed with regard to the custom of eliminating a route and then bumping the affected employee. Although it concedes that similar situations had occurred, it asserts that the Company did not establish that the action had taken place throughout the Company at all of its locations where employees were represented by the Union. It argues that even if past employees did not want to challenge the Company's actions, such does not establish a well-accepted practice binding on the Union. It claims that the incidents were insufficient by themselves, and were especially weak as binding practices since they were not proven to have been communicated to an executive with the Union. Since the Union officials did not know, and were not proven to have known of the practice, then it argues it was not binding.

The Union asserts that since neither Mr. Maddy, nor any other Union official was ever notified that the Company was removing bargaining unit employees from their routes and subcontracting the work, then it argues that it could not prove that the activity was "accepted" as a past practice. Citing arbitral authority, it claims that this essential element makes the past practice claim of the Company without merit.

For all these reasons, it asks that the Grievance be sustained; that a cease and desist order be made; that the Grievant be made whole and that any other remedy believed appropriate by the undersigned be made.

Company Contentions

The Company contends that the Union could not sustain its burden of proving that a violation of the Agreement occurred. It argues that the Agreement is silent as to the right of the Company to change distribution methods, or about entering relationships with independent distributors. Since there is nothing that precludes the Company from eliminating sales routes, and since there is an express right of employees whose routes are eliminated to bump into another route, then it asserts that the Parties contemplated the right of the Company to subcontract work as it did here. It cites the management rights clause as explicitly giving the Company the right to determine route efficiencies, and contends that the Company has relied on this language to consistently sell outlying routes, and eliminate those routes for the affected RSD's.

The Company claims that the Union is acting unfairly since each time the Company has eliminated a route it has notified the local Union Steward, who has never objected. It rejects any claim of the Union that notification to the Union Steward is insufficient, and contends that there is no authority that would support this claim. It argues that the Union's case does not rely on any part of the contract, and instead attempts to claim that the Grievant was a good employee who deserved better treatment. It asserts that since the uncontested facts show that *despite* her good work habits and *despite* her relatively good sales volume, the route was still losing $1,100.00 per week, then its decision was economically justified. It thus contends that the ancillary facts regarding the Grievant's relatively good work habits are irrelevant to the question of whether the Company has the right to control distribution methods and improve operations and efficiency.

The Company rejects this case as a straightforward subcontracting case since the independent distributors are not paid by the Company to deliver predetermined amounts of product to predetermined customers and locations on behalf of the Company. Since the independent distributors purchase the product from the Company, pay for the route, and own the exclusive right to distribute Company products, it argues that the issue is more complicated than just a subcontracting case. Since the distributor takes on the entire risk of loss for the product, plus other administrative overhead expenses, and essentially runs a separate business, then it argues that it is distinguishable. Since this is not a subcontracting relationship, then it argues that the Union's argument on this point is misplaced.

It cites arbitral authority for the proposition that changing distribution methods from direct sales delivery to independent distribution is not the functional equivalent of subcontracting work that would otherwise be performed by bargaining unit employees. It cites specific findings where an employer "is essentially getting out of the distribution business when it sells its assets" through independent distributors. It contends that although the decision affected certain bargaining members, the underlying purpose was to change the method of distribution where the decision on delivery to customers was made by the third party. Since the primary purpose of the transaction was to remove an unprofitable area of its business, then it argues that the negative impact to the bargaining unit was tangential. Since nothing in the Agreement prevents the Company from taking this action, it argues that no violation could be proven.

The Company asserts that even if it were a normal subcontracting case, the Union could still not sustain its burden. It asserts that since the Union has not cited a specific provision, then reasonableness and good faith are the appropriate standard. It cites arbitral authority for elements to consider whether such reasonableness and good faith were proven, and it contends that the Company's practice of selling and eliminating non-profitable, outlying routes shows both a past practice and a justification. It argues that the cost-benefit of the action is sufficient reason to subcontract under cited authority, and it asserts that any employer that does not take efforts to control costs will soon find itself closing its doors. Even if the past practice does not provide an independent reason for the Company's action, it argues that it proves that the decision was reasonable and not a violation of the Agreement.

The Company also cites other factors supporting its claim that a subcontracting violation did not occur. Since the change in the routes had a *de minimus* impact to the bargaining unit, then it argues that the subcontracting was not inherently destructive, nor did it reflect a discriminatory motive on the part of management. Since it proved that the actions were based on financial considerations, which the Union did not challenge, it argues that it proved its good faith and reasonableness.

The Company also contends that although it has maintained some internal control over distribution, its core business is the manufacture and sale of snack foods. It argues strenuously that it is not in the distribution business. It cites the fact that it has over 100 independent distributors, and only 80 RSD's as proof that the core part of its business is manufacturing and selling snack food. It cites authority for the idea that when the "core" business is not affected by subcontracting decisions, they are often permitted as outside the core competency. Indeed, it asserts that it is common in the industry for snack food makers to sell their routes to independent distributors – some use national brokers whose sole business is to assist businesses in buying and selling territories. It argues that if the class of work is frequently performed by independent contractors, then it is unlikely that management's decision to subcontract work is improper.

The Company asserts that it even proved that before making its decision to eliminate the route, it first took steps to make the route more profitable to see if could be made viable. It asserts that this proves a great deal of good faith, and evidence that the Company does not make its decisions on route elimination lightly. It cites the Parties' history for proof that the Union has known about the practice of using independent distributors, but has never filed a grievance, unfair labor practice, or attempted new language which would change the Company's methods. It argues that in this case the Company should be given wide latitude in subcontracting decisions.

For all these reasons, it asks that the Grievance be denied.

Discussion and Findings

A review of the record reveals that the Grievance must be denied. The basis for this finding is that the Union could not sustain its burden of proving that the elimination of the Grievant's route violated the Agreement.

An initial issue was raised as to the appropriate characterization of the Company's action – i.e. was it a subcontracting issue, or a transfer of work to an independent distributor. While at first blush the issue appears arcane, its resolution properly frames the issue, and thus determines the outcome. The Union's position is that the termination of the route, the transfer of the work to a third party independent distributor, and the transfer of the Grievant to the Columbus Distribution Center was an act of "subcontracting." The Company described the series of events as first an economic decision that the route was not profitable, and then a logical business decision to keep as much business as possible while transferring the risk associated with the business to a third party. Its version of events is that it was left with a choice – to proceed as it had in prior similar instances, or to simply end the route. The Company's characterization of the case is thus one of a pure business decision without regard to the impact to the Union, whereas the Union considers it a subcontracting of work from the bargaining unit to a third party solely to save on expenses.

In evaluating these parallel descriptions, it is first fair to conclude that the Union misses much of what has occurred over time with the Company. In a typical subcontracting case the exact work that had been done by bargaining unit personnel is hired out to a third party. This does not accurately describe what occurred here. A typical subcontracting case involves the transfer of an expense that was once a bargaining unit labor cost to a third party, at a cheaper rate, and with the ability to end the relationship when the work ends. This case involves more than just the simple transfer of work, and thus is not comparable to a typical subcontracting case.

This situation involves the Company transferring the expense *and* the potential revenue to a third party. It took money, and transferred the business enterprise to a third party. This must be recognized as different from a dispute where saving money is the sole consideration. Instead of just this one motivating factor, the Company was removing the risk and reward from its purview, and selling it to a third party. Because there are more factors involved than a normal subcontracting case, it would be unreasonable to classify it as a classic subcontracting case.

Also wrong is the Union's claim that the Company did this simply because the costs were too high. This type of argument is typically applied when the costs of labor compared to the costs of the subcontractor can be easily analyzed. Welding work by bargaining unit employees is the labor cost plus the costs of materials. If a subcontractor does it for less, expenses are reduced. As in other subcontracting cases, a pretty simple calculation is all that is required to see how the change will affect the bottom line.

The difference in a case where an entire business unit is transferred is that the impact to net profit of the entire company is harder to determine. In losing control of the business, and the business decisions, the Company has reduced its involvement to that of a supplier. The remaining part of the enterprise, both the upside and the down, is up to a third party. It must be recognized that this is much different than a straightforward comparison of subcontracted work versus bargaining unit work. Where an entire business unit is transferred, the factors justifying the change are much more numerous than a simple measure of the cost savings. The business decision must necessarily involve a calculation of the cost savings and the return on investment, and the net impact to the profitability of the entire company. In this situation the Union's position loses credibility since there is more to consider than just cost savings.

In this case the Company was able to prove that the route was not profitable and that the loss was ongoing. It showed that the route was unprofitable, and that there was a revenue stream that could be directly attributable to the amount of product sold. Thus, independent of the rest of the business, the Company could determine whether a route was profitable, and whether there was a return on the cost of keeping the route. This must be recognized as a distinguishing factor from the Union's cited authority, and thus from the arguments made based on a typical subcontracting analysis.

Indeed, the impact is helpful in following the logical result if the Union were to prevail. If the Grievance were found to have merit, the Company would have a situation where it would be forced, by contract, to continue a business activity that loses money every day. Each time it sells a product on the Grievant's route, through a RSD, more money is lost. This losing proposition, if forced, would logically lead to a situation where the Company is forced to keep non-performing assets (in the form of a route) because the Agreement is found to require it. This outcome is unreasonable, and, absent specific, clear language, would be difficult to support as being the intent of the Parties.

Moreover, as persuasively argued by the Company, the authority on this subject often considers the fact that the purpose of the change in method is to change the business methods altogether. Where an employer replaces precise bargaining unit work with a subcontractor doing the exact thing, it will more likely follow a traditional subcontracting analysis. However, where a company chooses a whole new method of doing its business, and where the third party is doing the work differently, a different analysis is required. In this case, the third party is buying company product. How they deliver, how much they deliver, which customers are chosen, and which products are sold are all the choice of the third party. The Company loses all control of the route, unlike a normal subcontracting case where the Company maintains complete control of the vendor – and could even argue that work was not done correctly and refuse to pay. In contrast, here the independent distributor buys product, and the Company has essentially no control over what happens next.

All of the foregoing requires that this case be characterized as something other than a subcontracting case. The Company has chosen a different manner of operating its business, and the work that is lost is not because of subcontracting, but because of the different methodology. This conclusion is supported by other factors in the case. The Company showed that its history includes making this type of decision, eliminating the route, and allowing the affected employee to bump. Although the Union argued that the business agent did not know of these actions, thus making the practice non-binding, it must be found that this claim is without merit. It is difficult to understand what else the Company was supposed to do as far as notice to the Union. There is no contractual provision that was cited that would require the business agent's involvement before actions are more influential (as past practices or otherwise), and it was not disputed that the local Union Steward was notified of the actions, without objection. As a result, it must be found that the fact that the Company has done this for some time, without objection of the Union, proved that the Parties have accepted it as a normal method of selling routes.

To find otherwise would mean that the Company would have to second guess every communication it had with the Union Steward. It is incumbent upon the Union Steward to communicate with his executives, and it is not reasonable to expect the Company to have to worry about whether all of its discussions were with the appropriate Union official. Why else have a Union Steward present and available? The Company thus proved that it communicated with the Union; that it had engaged in this practice without complaint; and that it had done so based on business needs.

Absent clear contract language, it must be found that the management right to control distribution, and determine profitability allows the action of the Company. The language that the Union cites, where the Parties contemplated situations where it "becomes necessary to eliminate a route or combine one route with another" in Article VIII-B, must be found as supportive of this decision. The "elimination" of a route is fairly interpreted as either being elimination due to the ending *or* selling of a route. It would not be logical to only make the language applicable to a situation where the Company determines that the lack of profitability only necessitates the complete withdrawal from a market. The elimination provision must be given a broader interpretation and it must apply where the lack of profitability could result in either the complete withdrawal from a market, or the selling of a route thus making the route eliminated from the Company's control. This broader meaning is justified based on the Company's business practices as currently configured. Since it has over 100 distribution partners and only 80 RSD's, then it follows that the Parties intended the elimination provision to cover all transfers of the work from the bargaining unit member to a third party, or to the ending of the work, while the other part of the provision covers other situations where the work is merged with another route.

To find otherwise would mean that the Parties knew enough to address situations where a route was ended completely when the Company would withdraw from a market; and they knew enough to address situations when routes were merged; but that they lacked enough foresight to understand that routes could be sold and a route could be eliminated in that fashion. This does not follow since the Company has had third party distributors as part of the business for some time. It is a more reasonable interpretation that they intended the two (2) instances in the provision – i.e. "elimination" or "merger" to cover all expected situations.

Based on the foregoing, it must be found that the language supports the analysis above, and expressly addresses the situation of the Grievant. Her work was eliminated through the sale of the route, and she was given the opportunity to bump. Her work was not subcontracted, it was unprofitable and the business was sold to a third party. Based on this analysis, it must be found that the Company did not violate the Agreement.

For all these reasons, the Grievance must be, and is, denied.

Award

The Grievance is hereby denied.

September 26, 2012
Cincinnati, Ohio

Michael Paolucci